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## A Preservation Paradox: Political Prestidigitation and an Enduring Resource of Wildness

Sandi Zellmer

*University of Nebraska Lincoln*, [szellmer2@unl.edu](mailto:szellmer2@unl.edu)

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## SYMPOSIUM ARTICLES

### A PRESERVATION PARADOX: POLITICAL PRESTIDIGITATION AND AN ENDURING RESOURCE OF WILDNESS

BY  
SANDRA ZELLMER<sup>\*</sup>

*The nation's preeminent preservation statute, the Wilderness Act of 1964, is now 40 years old. By authorizing a network of congressionally designated wilderness areas on public lands, the Act has proved invaluable for protecting special areas from the most intensive forms of intrusion by humankind. But the Act is facing a midlife crisis, and legitimate questions have been raised about its continuing viability as a conservation tool. This Article concludes that the preservation of wild lands remains an essential component of federal public lands management, but that the Wilderness Act, standing alone, has not fulfilled its promise of securing an enduring resource of wild lands. President Clinton and his agencies employed a variety of techniques for identifying and protecting wild places on federal lands outside of the wilderness network. The designation and protection of national landscape monuments and roadless conservation areas were the most notable of these techniques. Both were highly controversial, but neither is unprecedented nor unlawful. An expanding mosaic of executive preserves is a necessary complement to the wilderness*

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<sup>\*</sup> © Sandra Zellmer, 2004. Associate Professor of Law, University of Nebraska College of Law. I am grateful to the National Association of Environmental Law Societies for its invitation to speak on this topic at its annual conference, the University of Toledo and the University of Nebraska Colleges of Law for their summer research support, and Sara Hertz and Shannon Brennan for their stellar research efforts. The phrase "political prestidigitiation" is borrowed from Judge Brimmer, in *Wyoming v. United States Department of Agriculture*, 277 F. Supp. 2d 1197, 1203 (D.Wyo. 2003), *appeal pending* (10th Cir. 2003).

*network. Congressional, presidential, and administrative actions are all necessary components of a comprehensive federal preservation strategy for the protection of biodiversity and sustainable development.*

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*"[The wilderness idea is] mortally wounded by the withering critique to which it has been lately subjected. . . . [Yet it is] by all accounts, . . . the most powerful antidote to . . . exploitation in the environmentalists' cognitive arsenal."*<sup>1</sup>

## I. INTRODUCTION

A battle over the preservation of unroaded wild lands has been raging throughout the history of public lands management. During the past decade, the controversy has escalated to even greater heights, with ever increasing

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<sup>1</sup> J. Baird Callicott & Michael P. Nelson, *Introduction* to THE GREAT NEW WILDERNESS DEBATE 1, 12–13 (J. Baird Callicott & Michael P. Nelson eds., 1998).

pressure on ever more limited natural resources, accompanied by ever changing political responses. The battle has been joined at remarkable places like the Grand Canyon and the Sonoran Desert in Arizona; Jackson Hole, Wyoming; the Giant Sequoias of California; Steens Mountain, Oregon; and Otero Mesa, New Mexico.

The foremost federal wild land preservation statute, the Wilderness Act of 1964,<sup>2</sup> is now forty years old. By authorizing a network of congressionally designated “untrammeled” wilderness areas on public lands, the Act has proved invaluable for protecting special areas from the most intensive forms of intrusion by humankind.<sup>3</sup>

Years ago, wild land activist Edward Abbey proclaimed that “wilderness needs no defense, only more defenders.”<sup>4</sup> Today, however, critics assert that, like Moses’s biblical sojourn in the wilds of Sinai, forty years of wilderness expansion is quite enough.<sup>5</sup> In recent years, Congress has been slow to designate wilderness areas, and the Bush Administration has refused to identify new wilderness study areas for inclusion under the Act.

During the Clinton Administration, the President and his agencies employed a variety of techniques for identifying and protecting wild places on federal lands without having to rely on Congress. The most notable and broad-sweeping involved the designation and protection of national landscape monuments and roadless conservation areas. Both initiatives were highly controversial, but neither is unprecedented. In fact, an extensive array of executive preserves already existed, created over the course of the past century through presidential orders as well as agency rulemaking and planning processes. Examples include research natural areas, late successional reserves, and areas of critical environmental concern. Many of these areas have been or could be considered for official wilderness status. Many of them are especially rich in biodiversity. And many of them have faced and continue to face significant development pressure.

Development interests and proponents of strong state and local authority insist that executive preserves are, in effect, a new federal land grab that displaces the fundamental principles of multiple-use management. They also claim that, by designating an expanding mosaic of administrative preserves, the executive branch has unlawfully and undemocratically created “wilderness,” a function explicitly reserved to—and best carried out by—Congress.

Members of the preservationist camp can find fault with executive preservation initiatives as well. The current administration’s refusal to continue with Clinton-era strategies to protect roadless areas and national landscape monuments indicates executive branch initiatives may not be the best vehicle for accomplishing sustainable preservation ends. Yet the

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<sup>2</sup> 16 U.S.C. §§ 1131–1136 (2000).

<sup>3</sup> *Id.* § 1131(c).

<sup>4</sup> Reed F. Noss, *Wilderness Recovery: Thinking Big in Restoration Ecology*, in *THE GREAT NEW WILDERNESS DEBATE*, *supra* note 1, at 521, 525.

<sup>5</sup> Stephen H. Urquhart, *Lost in the Wilderness*, NAT. RESOURCES & ENV’T, Winter 2004, at 66; see *Exodus* 16:1.

cumbersome and compromise-ridden legislative process has not fulfilled the Wilderness Act's goal of "securing an enduring resource of wilderness."<sup>6</sup> Executive efforts have been an essential means of filling the nation's preservation gaps.

This Article considers both the need for wild land preservation and the effectiveness of legislative and executive processes for preserving wild lands, focusing on multiple-use lands, specifically the United States Forest Service (Forest Service) and United States Bureau of Land Management (BLM) systems. It assesses substantive and procedural strengths and weaknesses of wilderness areas, national monuments, roadless conservation areas, and other types of preserves within the existing multiple-use framework.

Substantive concerns center on the effectiveness of federal preservation initiatives with respect to contemporary land management norms, particularly biodiversity and sustainable development. The preservation of natural features and communities on federal lands is a critical component of sustaining ecological structure and function, biological integrity, and human communities. On purely anthropocentric grounds, wild lands provide opportunities for solitude, nonmechanized recreation, and quiet—an ever diminishing commodity in an increasingly urban world.

Any initiative that relies solely on federal lands cannot provide a comprehensive preservation strategy for the nation,<sup>7</sup> but federal land preserves can be both a logical and effective first step. As the nation's largest landowner, the federal government should be the initial and even the principal focal point for an integrated biodiversity strategy.<sup>8</sup> The Wilderness Act represents the beginning of the modern preservation era in federal lands policy, but the preservation agenda is far from complete. Existing federal laws and land management policies "are neither a strong web nor a coherent strategy, but rather a patchwork of halfway measures, interstitial tinkering, and missed opportunities for conserving biodiversity."<sup>9</sup> In spite of the Wilderness Act, the ratio of lands in preservation status to nonprotected

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<sup>6</sup> 16 U.S.C. § 1131(a) (2000).

<sup>7</sup> See Sandra Zellmer & Scott Johnson, *Biodiversity in and Around McElligot's Pool*, 38 IDAHO L. REV. 473 (2002) (discussing health of private land biodiversity, and arguing for farmland protection); Holly Doremus, *Biodiversity and the Challenge of Saving the Ordinary*, 38 IDAHO L. REV. 325 (2002) ("[W]e must find ways to focus the law and the public on ordinary nature rather than merely the obviously special or unique aspects of nature.").

<sup>8</sup> Bradley C. Karkkainen, *Biodiversity and Land*, 83 CORNELL L. REV. 1, 9, 48–49 (1997) ("Although they fall short of fully representing all of the nation's ecosystem types, the lands the federal government currently holds present enormous conservation opportunities and are the logical starting point for a national biodiversity conservation strategy.").

<sup>9</sup> *Id.* at 6.

lands in the United States is miniscule.<sup>10</sup> Additional federal land preservation tools, including presidential and agency action, are necessary.

As for human uses and expectations, preserving wild lands is an important and lawful engine of change toward sustainable development on multiple-use lands. The multiple-use sustained-yield (MUSY) principle that dominates the management of public lands has evolved significantly over the years, in part due to wild land designations but more importantly due to the evolving expectations and demands of the public. Professor George Coggins claims that, as a governing principle, MUSY is dying, because the creation of wilderness and other “dominant use zones” effectively preempts the land managers’ discretion to allow development.<sup>11</sup> Plenty of scholars and activists would applaud its passing, but in all likelihood the reports of MUSY’s death are greatly exaggerated. The MUSY standard shows signs of having morphed beyond its production-oriented roots into something more like sustainable development, an overarching objective of international law norms. As in ecology, evolution and change in the law are not only inevitable; in some contexts they are essential.<sup>12</sup> As for MUSY, adaptation toward sustainable development is a positive step.

Significant procedural concerns are also implicated by legislative and executive decision-making processes for preserving federal wild lands. Process-oriented objectives include predictability and visibility, public involvement and acceptance, and political and judicial accountability. Legislation is said to be the most democratic form of decision making, where elected representatives air proposals in a public forum and are directly accountable to their constituents. If Congress fails to pass significant new wilderness designations, arguably it is because the majority of the voters do not want more wilderness. This hypothesis does not stand up to close scrutiny, as the general public consistently expresses a desire for more wild preserves. It appears that local concerns—generally slanted toward development—tend to hold the designation process hostage in Congress.

Administrative rulemaking and planning processes can also be stymied by local interests and industry “capture,” but national preservation interests are more likely to be aired through the opportunities for public involvement provided by administrative processes, and judicial review is available to safeguard against arbitrary action. The primary deficiency of the administrative decision-making process may be the “analysis paralysis” or

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<sup>10</sup> See Reed F. Noss, *Sustainability and Wilderness*, in THE GREAT NEW WILDERNESS DEBATE, *supra* note 1, at 408, 411 (stating that the ratio of preservation land to multiple-use land in 1991 was 5:95). Less than 3% of all land in the contiguous United States has been federally designated as wilderness. ROSS W. GORTE, CONG. RESEARCH SERV., REPORT NO. RL31477, WILDERNESS: OVERVIEW AND STATISTICS 1 (2002). Worldwide, only around 4% of land is protected by law in some form of preservation status. Donald M. Waller, *Getting Back to the Right Nature: A Reply to Cronon’s “The Trouble with Wilderness,”* in THE GREAT NEW WILDERNESS DEBATE, *supra* note 1, at 540, 546 (citing E.O. WILSON, THE DIVERSITY OF LIFE 337 (1992)).

<sup>11</sup> George Cameron Coggins, *The Changing Face of Federal Public Land and Resources Law: 1971 to 1999 and Beyond*, SE55 ALI-ABA 179, 188 (Feb. 9, 2000).

<sup>12</sup> In both law and biology, “stasis is death; only growth and change keep the organism alive.” Marci A. Hamilton, *Art Speech*, 49 VAND. L. REV. 73, 76 (1996).

ossification that arises as a result of the very procedural requirements that serve as its strength. Unilateral presidential proclamations avoid this pitfall, and the ability to issue executive orders expeditiously is a crucial tool in the preservation toolbox. Executive orders, however, are the least visible and allow the least opportunity for public involvement. Procedural deficiencies are exacerbated by the diminished potential for meaningful judicial review of presidential decrees. Yet these shortcomings are far from fatal, both because the President is uniquely accountable and because presidential preservation proclamations simply preserve the status quo. Congress can step in after the fact and open the lands at issue to development if it so desires.

In the end, the preservation of wild, unroaded public lands is imperative for promoting biodiversity as well as for fulfilling sustainable human aspirations. Legislative and executive preservation strategies each have unique strengths and weaknesses. Their substantive and procedural features are largely complementary and serve as important components of a comprehensive federal preservation strategy.

## II. WILDERNESS AND WILD LANDS: NECESSITY OR ANACHRONISM?

*"[Wildness]... is the bog in our brains and bowels, the primitive vigor of Nature in us, that inspires th[e] dream."*<sup>13</sup>

In the 1860s, Henry David Thoreau proclaimed that "in Wildness is the preservation of the World."<sup>14</sup> Wild land is generally characterized by natural conditions. Naturalness reflects as a range of conditions over a period of time during which the major controlling factors—climate, soil composition, biota, physical processes and disturbance—remain relatively constant.<sup>15</sup> An area may be considered "wild" if the land and its living community are intact and functioning without substantial alteration by human activity.<sup>16</sup> Wild lands can be found virtually anywhere, and can be protected in a variety of ways. Wilderness, a more narrow term, refers to an area officially designated by Congress for preservation from development.<sup>17</sup> Thus, while wildness is a

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<sup>13</sup> Christine Klein, *Preserving Monumental Landscapes Under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1399 (2002) (quoting Henry David Thoreau, *Journal*, Aug. 30, 1856, *epigraph* to SIMON SCHAMA, *LANDSCAPE AND MEMORY* (1995)).

<sup>14</sup> Henry David Thoreau, *Walking*, in THE GREAT NEW WILDERNESS DEBATE, *supra* note 1, at 31, 37.

<sup>15</sup> George H. Aplet, *On the Nature of Wilderness: Exploring What Wilderness Really Protects*, DENV. U. L. REV. 347, 355. See also *Wilderness Soc'y v. United States Fish & Wildlife Serv.*, 316 F.3d 913, 923 (9th Cir. 2003) (citing BLACK'S LAW DICTIONARY 1026 (6th ed. 1990) (defining "natural" as "wild, formed by nature and not artificial")), *rev'd on other grounds on rehearing en banc*, 353 F.3d 1051 (9th Cir. 2003), *amended in part*, 360 F.3d 1374 (2004).

<sup>16</sup> Aplet, *supra* note 15, at 352–55; see also Waller, *supra* note 10, at 546–47 (stating that wildness is found where the evolutionary and ecological relationships between organisms and their habitats are intact).

<sup>17</sup> Robert L. Glicksman & George Cameron Coggins, *Wilderness in Context*, 76 DENV. U. L. REV. 383, 383 (1999). See *infra* Part IV.A for a discussion of wilderness designation.

physical characteristic, wilderness is a legally defined human construct, identifiable by legislatively described boundaries.<sup>18</sup>

Roadlessness is an important hallmark of naturally functioning, wild ecosystems, and it has become the benchmark for wilderness consideration.<sup>19</sup> The case for preserving wild, unroaded lands can be made on both ecological and human-centered grounds.

### *A. Biodiversity Values of Wild Lands*

By some estimates, *half* of all living bird and mammal species will be gone within 200–300 years.<sup>20</sup> This includes “canaries in the coal mines,” the indicator species that provide a first alert system against impending environmental threats,<sup>21</sup> as well as keystone species that act as the building blocks of functioning ecosystems.<sup>22</sup> Extinction of species is a natural phenomenon, but the rate of extinction today is extraordinary—at least 1,000 times greater than background levels.<sup>23</sup> The loss of genetic and species diversity reduces productivity in plant and animal communities, nutrient retention and availability, and, ultimately, ecosystem stability.<sup>24</sup>

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<sup>18</sup> Aplet, *supra* note 15, at 350; *see also* Glicksman & Coggins, *supra* note 17, at 383 (“Wilderness is both a geophysical reality and a legally defined land category.”); Jack Turner, *In Wilderness is the Preservation of the World, in THE GREAT NEW WILDERNESS DEBATE*, *supra* note 1, at 617, 619 (noting the artificiality of wilderness designation).

<sup>19</sup> Unroaded or roadless areas are generally identified as areas of undeveloped land without roads maintained for travel by motor vehicles intended for highway use. *Northwest Indian Cemetery Ass’n v. Peterson*, 795 F.2d 688, 689 n.1 (9th Cir. 1986), *rev’d on other grounds*, 485 U.S. 439 (1988); *see also* John Klein-Robbelaar, *Judicial Review of Forest Service Timber Sales: Environmental Plaintiffs Gain New Options Under the Oregon Wilderness Act*, 35 NAT. RESOURCES J. 201, 206 (1995) (emphasizing that only roadless lands were labeled “wilderness” in the RARE II Environmental Impact Statement). *See infra* Part V.B for a discussion of what roadless areas are covered by the Forest Service’s Roadless Rule.

<sup>20</sup> *Extinction Rate Across the Globe Reaches Historical Proportions*, SCIENCE DAILY, at <http://www.sciencedaily.com/releases/2002/01/020109074801.htm> (last visited Nov. 14, 2004) (emphasis added); *see also* WILSON, *supra* note 10, at 346 (predicting a 20% loss in species within 30 years, absent significant efforts to halt the decline).

<sup>21</sup> *See* Jim Chen, *Diversity in a Different Dimension: Evolutionary Theory and Affirmative Action’s Destiny*, 59 OHIO ST. L.J. 811, 878 (1998) (“When frogs sprout extra limbs, develop genital deformities, or disappear altogether, they sound a piercing environmental alarm.”).

<sup>22</sup> *See* WILSON, *supra* note 10, at 401 (explaining that “keystone species” influence the survival of many others in the ecological community); John Copeland Nagle, *Playing Noah*, 82 MINN. L. REV. 1171, 1249 n.284 (1999) (providing sources on the importance of preserving keystone and indicator species).

<sup>23</sup> *See* WILSON, *supra* note 10, at 280 (concluding that anthropocentric activities have increased extinction between 1,000 and 10,000 times beyond the background rate of about one species per million a year); Phillip A. Levin & Donald A. Levin, *The Real Biodiversity Crisis*, 90 AM. SCIENTIST 1, 6 (2002) (reporting that, on average, a distinct species of plant or animal becomes extinct every 20 minutes).

<sup>24</sup> David Tilman, *Causes, Consequences and Ethics of Biodiversity*, 405 NATURE 208, 208–09 (2000); *see also* Jim Chen, *Webs of Life: Biodiversity Conservation as a Species of Information Policy*, 89 IOWA L. REV. 495, 549 (2004) (describing the debate among ecologists on the consequences of biodiversity loss for ecological stability). Ecosystem stability focuses on predictable functions and outcomes over time, and is distinct from the largely defunct “equilibrium theory,” which posited that undisturbed or natural ecosystems would inevitably



The leading cause of extinction is habitat destruction.<sup>25</sup> Nearly half of the wetlands in the contiguous United States have been lost since European settlement;<sup>26</sup> 99 percent of our tallgrass prairies are gone,<sup>27</sup> and over 70 percent of the nation's old growth forests have been harvested.<sup>28</sup>

As federal zeal to control development dissolves under the force of political and judicial pressure, the destruction of wetlands, forests, and other habitats on private lands is likely to accelerate. The Supreme Court's ruling in *Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers (SWANCC)*,<sup>29</sup> which called into question the federal government's ability to regulate isolated wetlands, has had a chilling effect on both pollution control and wildlife protective measures on nonfederal lands.<sup>30</sup> Congress and the executive branch increasingly prefer collaborative and voluntary approaches for influencing private interests,<sup>31</sup> while local planning commissions hesitate to exert stringent controls on development for fear of takings claims.<sup>32</sup>

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reach a stable stage of climax and stasis. See DANIEL B. BOTKIN, *DISCORDANT HARMONIES: A NEW ECOLOGY FOR THE TWENTY-FIRST CENTURY* 190 (1990).

<sup>25</sup> See H.R. REP. NO. 95-1625, at 5 (1978) ("The loss of habitat for many species is universally cited as the major cause for the extinction of species worldwide."); E.O. Wilson, *The Current State of Biological Diversity*, in *BIODIVERSITY* 1, 3 (E.O. Wilson & Frances M. Peter eds., 1988) (stating that extinctions due to habitat loss are increasing dramatically); Paul R. Ehrlich & E.O. Wilson, *Biodiversity Studies: Science and Policy*, 253 *SCIENCE* 758, 759-760 (1991) (predicting that widespread destruction of natural habitat will cause significant losses of species within a few decades); Peter Raven, *Our Diminishing Tropical Forests*, in *BIODIVERSITY*, *supra*, at 119, 121 (making similar predictions in the context of tropical forests).

<sup>26</sup> Roger L. Pederson, *Farms and Wetlands Benefit from Farm Bill Conservation Measures*, NAT'L WETLANDS NEWSL. (Env'tl. Law Inst.), Sept.-Oct. 2001, at 9-10; James W. O'Brien, *Federal and State Regulation of Wetlands in Iowa*, 41 *DRAKE L. REV.* 139, 147 n.53 (1992).

<sup>27</sup> PARTNERS IN FLIGHT, FINDING SOLUTIONS TO HABITAT LOSS 1, *available at* <http://birds.fws.gov/documents/HabitatLoss.pdf>.

<sup>28</sup> WALTER V. REID & KENTON R. MILLER, *KEEPING OPTIONS ALIVE: THE SCIENTIFIC BASIS FOR CONSERVING BIODIVERSITY* 37-38, 48-49 (1989).

<sup>29</sup> 531 U.S. 159 (2001).

<sup>30</sup> See Alexandra C. Chiaruttini, *Jurisdictional Wetlands: A Primer on the Relevance and Scope of the U.S. Supreme Court Decision In SWANCC*, *LEGAL INTELLIGENCER*, Apr. 12, 2004, at S6 (describing agency's response to *SWANCC*); Sandra Gibbs, *Court, Agencies Muddy the Waters on Wetlands Regulation*, *LEGAL INTELLIGENCER*, Jan. 16, 2003, at 5 (noting that *SWANCC* could result in the loss of federal protection for up to 20 million acres of wetlands). *But see* Jeffrey H. Wood, *Recalibrating the Federal Government's Authority to Regulate Intrastate Endangered Species After SWANCC*, 19 *J. LAND USE & ENVT'L. L.* 91, 110 (2003) (collecting cases that indicate judicial reluctance to extend *SWANCC*'s reasoning to the ESA).

<sup>31</sup> See Small Business Liability Relief and Brownfields Revitalization Act, Pub. L. No. 107-118, 115 Stat. 2378-0 (2002) (codified in relevant part at 42 U.S.C. §§ 9628(b)(1)(C) and 9605(h)) (deferring to state "voluntary action" programs and limiting federal enforcement capabilities for brownfield sites if state programs meet certain criteria); P. Lynn Scarlett, *A New Approach To Conservation: The Case For The Four C's*, 17 *NAT. RESOURCES & ENV'T* 73, 111 (Fall 2002) (describing Interior Secretary Norton's "Four C's" approach of "consultation, cooperation and communication, all in the service of conservation").

<sup>32</sup> See *Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003 (1992) (holding that the Coastal Commission had "taken" private developers' property without just compensation under the Fifth Amendment when the developer made an uncontested showing that development restrictions deprived him of all economic value).

As these forces converge, we are forced to rely more heavily on federal public lands to provide habitat needs and, by extension, biodiversity needs. One immediately conjures up images of Yellowstone and Yosemite, but in reality over 60 percent of all federal public land is open for development—mining, grazing, timber harvest, and other intensive uses.<sup>33</sup>

Most extractive uses require roads. From jeep tracks to highways, roads are pervasive across the American landscape, even in remote areas managed by the federal government.<sup>34</sup> There are nearly 390,000 miles of National Forest Transportation System roads.<sup>35</sup> Although this figure represents just ten percent of the total road length in the United States,<sup>36</sup> it is enough to encircle the globe 14 times.<sup>37</sup>

Roads, both paved and unpaved, have significant adverse effects on wildlife, vegetation, and water, soil, and air quality. “Probably no single feature of human-dominated landscapes is more threatening to biodiversity (aquatic and terrestrial) than roads.”<sup>38</sup> Roads crisscross natural boundaries, altering preexisting patterns of movement and communication within and between ecosystems.<sup>39</sup> The abundance and diversity of native species is diminished near roads, while opportunistic exotic species thrive in and near the clearings created by roads.<sup>40</sup> Roads provide greater access for humans,

<sup>33</sup> See *Morning Edition: Analysis: Exploration of Domestic Oil and Gas in the Rocky Mountain Front*, (Nat'l Pub. Radio, Sept. 19, 2003) 2003 WL 4859965 (statement of Elizabeth Arnold) (“The administration's own study found that roughly 60 percent of oil and natural gas reserves on public land in the West can be tapped with minimal leasing restrictions.”); Joseph M. Feller, *Til the Cows Come Home: The Fatal Flaw In the Clinton Administration's Public Lands Grazing Policy*, 25 ENVTL. L. 703, 703 (1995) (stating that 90% of BLM land is open for grazing); W. BRAD SMITH ET AL., *FOREST RESOURCES OF THE UNITED STATES* 6 (1997) (reporting that 67% of National Forest land is considered suitable for harvest), available at [http://www.ncrs.fs.fed.us/pubs/gtr/gtr\\_nc219.pdf](http://www.ncrs.fs.fed.us/pubs/gtr/gtr_nc219.pdf).

<sup>34</sup> Kurt H. Riitters & James D. Wickham, *How Far to the Nearest Road?*, 1 FRONTIERS IN ECOLOGY & ENV'T 125, 125–128 (2003); G.E. Heilman, Jr. et al., *Forest Fragmentation of the Conterminous U.S.: Assessing Forest Intactness Through Road Density and Spatial Characteristics*, 52 BIOSCIENCE 411 (2002).

<sup>35</sup> UNITED STATES FOREST SERVICE, ROADLESS AREA CONSERVATION RULEMAKING FACTS, at [http://roadless.fs.fed.us/documents/rule/zRULE\\_Facts\\_1-5-01.htm](http://roadless.fs.fed.us/documents/rule/zRULE_Facts_1-5-01.htm) (last visited Nov. 14, 2004). A road is defined by the Forest Service as “[a] motor vehicle travelway over 50 inches wide, unless designated and managed as a trail.” Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3272 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294). A trail is an area “established for travel by foot, stock, or trail vehicle.” *Id.* at 3251.

<sup>36</sup> Radley Z. Watkins et al., *Effects of Forest Roads on Understory Plants in a Managed Hardwood Landscape*, 17 CONSERVATION BIOLOGY 411, 412 (2003).

<sup>37</sup> DYAN ZASLOWSKY & T.H. WATKINS, *THESE AMERICAN LANDS: PARKS, WILDERNESS AND THE PUBLIC LANDS* 91, 101 (1994).

<sup>38</sup> Noss, *supra* note 4, at 523.

<sup>39</sup> Riitters & Wickham, *supra* note 34, at 125; RICHARD T.T. FORMAN ET AL., *ROAD ECOLOGY: SCIENCE AND SOLUTIONS* (2003); see Waller, *supra* note 10, at 553 (“Many species are . . . incapable of dispersing across open or inhospitable habitats such as clear-cuts or roads, which dissect their populations into smaller subunits that are increasingly vulnerable to genetic and demographic hazards.”).

<sup>40</sup> Jayne Belnap & Jonathan Gelbard, *Roads as Conduits for Exotic Plant Invasions in a Semiarid Landscape*, 17 CONSERVATION BIOLOGY 420, 420 (2003); see also Watkins, *supra* note 36, at 411 (studying effects of unpaved forest roads); Sari C. Saunders et al., *Effects of Roads on Landscape Structure Within Nested Units of the Northern Great Lakes, U.S.A.*, 103 BIOLOGICAL

contributing to direct death or injury to wildlife species from roadkill and hunting, as well as indirect effects due to noise, air and water pollution.<sup>41</sup>

Adverse "edge effects" extend well beyond the road corridor, with distances varying depending on road type, slope, and other physical factors.<sup>42</sup> Based on conservative estimates, over 20 percent of the total land base in the contiguous United States is affected by roads, from jeep trails to interstate highways,<sup>43</sup> although only one percent of the land is physically covered by roads.<sup>44</sup> "[A] remarkably high proportion of the conterminous US is located within a short distance [1 kilometer] of the nearest road. Ecological impacts from roads may be the rule rather than the exception in many regions, and few places are likely to be immune from all road-mediated impacts."<sup>45</sup>

Poorly maintained roads exacerbate erosion problems, poor water and air quality, and safety concerns.<sup>46</sup> The Forest Service receives less than twenty percent of its annual funding requests for road maintenance, and estimates an \$8 billion backlog of transportation needs on its land.<sup>47</sup>

In contrast, roadless areas on public lands provide a variety of ecological benefits: 1) high quality soil, water and air; 2) diverse communities of plants and animals; and 3) blocks of contiguous habitat for species, especially large carnivores and omnivores, dependent on expansive, undisturbed areas of land.<sup>48</sup>

Granted, roadlessness is a rather crude instrument for evaluating the biodiversity potential of the land. Biodiversity entails a range of factors, including the presence and viability of endemic or rare species and their

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CONSERVATION 209, 209 (2002) (studying effects of paved roads); Rebecca A. Reed et al., *Contribution of Roads to Forest Fragmentation in the Rocky Mountains*, 10 CONSERVATION BIOLOGY 1098, 1098–1106 (1996) (comparing vegetative responses to roads and clearcuts).

<sup>41</sup> Noss, *supra* note 4, at 523–24.

<sup>42</sup> See Saunders et al., *supra* note 40, at 210 (stating that habitat degradation extends, on average, 50 meters from the road, given a road width of 10 meters); FORMAN ET AL., *supra* note 39, at 306–18 (concluding that effects can be seen up to 810 meters from the road).

<sup>43</sup> See Richard T.T. Forman, *Estimate of the Area Affected Ecologically by the Road System of the United States*, 14 CONSERVATION BIOLOGY 31, 31–35 (2000) (concluding that 22% of the U.S. land base is affected by roads, based on edge effects ranging from 100 meters near secondary roads to 810 meters near major roads); Riitters, *supra* note 34, at 127 (noting that "22% is a minimum estimate of land area affected by roads").

<sup>44</sup> Saunders et al., *supra* note 40.

<sup>45</sup> Riitters, *supra* note 34, at 128.

<sup>46</sup> Administration of the Forest Development Transportation System, 63 Fed. Reg. 4350, 4350 (Jan. 28, 1998).

<sup>47</sup> U.S. FOREST SERVICE, FOREST SERVICE ROADLESS AREA CONSERVATION FINAL ENVIRONMENTAL IMPACT STATEMENT, NATIONAL FOREST SYSTEM ROADS SPECIALIST REPORT (2000), available at [http://roadless.fs.fed.us/documents/feis/specprep/Roads\\_Spec\\_Report.PDF](http://roadless.fs.fed.us/documents/feis/specprep/Roads_Spec_Report.PDF).

<sup>48</sup> See Noss, *supra* note 4, at 523 ("It is no accident that the only ecosystems that include all native carnivores are very large roadless areas."). "Large carnivores are symbolic and authentic indicators of healthy land; when they and the wilderness they depend on are gone, the land is impoverished immeasurably." Noss, *supra* note 10, at 410 (citing J. Terborgh, *The Big Things that Run the World – A Sequel to E.O. Wilson*, 2 CONSERVATION BIOLOGY 402, 402 (1988)); see Guy Gugliotta, *Return of the Wolf: Reintroduction Shifts Ecology in Yellowstone*, LINCOLN J.-STAR, Feb. 12, 2004, at D1 (describing enhanced biodiversity throughout the Greater Yellowstone Ecosystem as a result of gray wolf reintroduction).

related biological communities, as well as the geographic distribution of a rich variety of species.<sup>49</sup> Roadlessness, however, provides objective criteria with which one can easily identify and protect natural features and large areas of intact, functioning ecological components. Large roadless reserves are easier to defend against encroachment, suffer less intensive edge effects, and require less management per unit.<sup>50</sup> As such, roadlessness has long been the centerpiece of the Forest Service's preservation policy. In fact, the massive expansion of road building in national forests and parks between 1916 and 1921 was a prime motivating factor for subsequent preservation efforts on both categories of federal land.<sup>51</sup>

### *B. Anthropocentric Values of Wild Lands*

*"Oh, give me land, lots of land under starry skies above, don't fence me in,  
Let me ride through the wide open country that I love, don't fence me in."*<sup>52</sup>

America's vast public lands and their natural resources have been instrumental in promoting "manifest destiny" and priming the nation's economic pump throughout our history.<sup>53</sup> Nineteenth century laws encouraged the rapid expansion of the West, and millions of acres were transferred to homesteaders, railroads, miners, and others. But the law eventually reflected the sense that the federal lands had special values and should be retained in public ownership. Forest reserves, parks, and wildlife refuges were withdrawn from homesteading and other government "giveaways" and reserved for recreation, conservation and other public purposes.<sup>54</sup>

Multiple-use sustained-yield (MUSY) principles prevail on most public lands. A MUSY mandate was first expressed as official government policy by forester Gifford Pinchot and his colleagues in the 1880s and subsequently by

<sup>49</sup> Zellmer & Johnson, *supra* note 7, at 486–87.

<sup>50</sup> Ecologist Reed Noss has written extensively on this subject. *See, e.g.*, Noss, *supra* note 4, at 528; Reed F. Noss, *What Should Endangered Ecosystems Mean to the Wildlands Project?*, WILD EARTH, Winter 1995–96, at 20. If preserves are sufficiently large and interconnected, their biological resources have a better chance of adapting than if they were "confined to a few isolated scraps." Noss, *supra* note 10, at 412.

<sup>51</sup> R. Edward Grumbine, *Using Biodiversity as a Justification for Nature Protection in the US*, in THE GREAT NEW WILDERNESS DEBATE 595, *supra* note 1, at 600 (CRAIG W. ALLIN, THE POLITICS OF WILDERNESS PRESERVATION (1982)). *See generally* PAUL S. SUTTER, DRIVEN WILD: HOW THE FIGHT AGAINST AUTOMOBILES LAUNCHED THE MODERN WILDERNESS MOVEMENT 120–21, 349 (William Cronon ed., 2002) (describing tensions created by growth in tourism and vehicle traffic in National Parks and Forests in the 1920s).

<sup>52</sup> Cole Porter, *Don't Fence Me In* (Twentieth Century Fox, 1944) (as recorded by Bing Crosby). Lyrics are available at <http://www.kcmetro.cc.mo.us/pennvalley/biology/lewis/crosby/DontFence.html> (last visited Nov. 14, 2004).

<sup>53</sup> *See* Sandra Zellmer, *Sustaining Geographies of Hope: Cultural Resources on Public Lands*, 73 U. COLO. L. REV. 413, 418 (2002) (discussing the role of natural resources in shaping the nation's cultural heritage) (citing CHARLES F. WILKINSON & H. MICHAEL ANDERSON, LAND AND RESOURCE PLANNING IN THE NATIONAL FORESTS 18, 460–61 (1975)).

<sup>54</sup> *Id.* at 422–23.

Congress through statutes governing Forest Service and BLM management.<sup>55</sup> The contemporary usage of the public lands today is much different than it was when the MUSY standard was first adopted. The population has become increasingly urban, and people with expendable income demand more recreational and aesthetic opportunities. As a result, mining and timber harvest on public lands are down, while recreational uses and the services that accompany them have increased dramatically:

- national forest timber harvest is down 75 percent, from 12 billion board feet (BBF) in the 1960s to four BBF in the 1990s;<sup>56</sup>
- oil and gas leases are down 71 percent from their 1960s peak level;<sup>57</sup> and
- visitor use days on national forest lands are up 1,100 percent since 1950.<sup>58</sup>

The demographics of communities adjacent to the public lands reflect these changes. "[F]rom the 1970s to the 1990s counties with federally designated wilderness areas grew two to three times faster than all other counties in the nation, rural or urban."<sup>59</sup> Meanwhile, by the 1990s, western states had begun to count on tourism as largest part of their economies, and service related activities comprised 80 percent of employment in the Rocky Mountain West.<sup>60</sup> By economic measures, the value of recreational resources on western public lands far exceeds the value of commodity production.<sup>61</sup>

<sup>55</sup> See *infra* Part III.B for a discussion of the evolution and application of the MUSY principle on National Forest and BLM lands.

<sup>56</sup> Jan G. Laitos & Thomas A. Carr, *The Transformation on Public Lands*, 26 *ECOLOGY L.Q.* 140, 153 (1999); Coggins, *supra* note 11, at 188.

<sup>57</sup> Laitos & Carr, *supra* note 56, at 152–60. In contrast to timber harvest and mineral leasing, grazing on the federal lands remains relatively constant. See Feller, *supra* note 33, at 703 (stating that grazing, "the most extensive commercial use of public lands in the United States," is authorized on about 90% of BLM lands). Feller notes that "the public lands produce only about two percent of the feed consumed by beef cattle in the United States," even though "[v]irtually all BLM lands that *can* be grazed, are grazed." *Id.* at 704.

<sup>58</sup> Laitos & Carr, *supra* note 56, at 161. Former Secretary Daniel Glickman predicted that, by the early 21st century, \$100 billion of the \$130 billion contributed by the National Forests to the national economy will be recreation-based. *Id.* at 160. Recreation constitutes an estimated 74% of economic benefits from Forest Service lands. James R. Rasband, *The Rise of Urban Archipelagoes in the American West: A New Reservation Policy?*, 31 *ENVTL. L.* 1, 27 (2001).

<sup>59</sup> A. Dan Tarlock & Sarah B. Van deWetering, *Growth Management And Western Water Law From Urban Oases To Archipelagos*, 5 *HASTINGS W.-NW. J. ENVTL. L. & POL'Y* 163, 164 (1999) (citing *ATLAS OF THE NEW WEST: PORTRAIT OF A CHANGING REGION* (William Riebsame ed., 1997)).

<sup>60</sup> Laitos & Carr, *supra* note 56, at 181–84 (citing Jon Margolis, *The Latest 1,000-Pound Gorilla*, *HIGH COUNTRY NEWS*, Apr. 27, 1998, at 15).

<sup>61</sup> See Laitos & Carr, *supra* note 56, at 181–84 (discussing amenity values and their contribution to the economic value of land); see Feller, *supra* note 33, at 704 (assessing value of range resources versus environmental amenities). See generally THOMAS M. POWER, *LOST LANDSCAPES AND FAILED ECONOMIES: THE SEARCH FOR A VALUE OF PLACE* (1996) (describing diminishing returns from extractive uses of the public lands). The economic returns of ranching, mining, and logging on public lands are further diminished when federal subsidies are factored into the equation. See generally Dale A. Oesterle, *Public Land: How Much Is Enough?*, 23 *ECOLOGY L.Q.* 521, 526–27 (1996) (discussing grazing subsidies); Michael Axline, *Forest Health and the Politics of Expediency*, 26 *ENVTL. L.* 613, 619 (1996) (discussing timber subsidies); MAJORITY STAFF OF THE HOUSE SUBCOMM. ON OVERSIGHT OF THE COMM. ON NATURAL RES., 103D CONG., *TAKING FROM THE TAXPAYER: PUBLIC SUBSIDIES FOR NATURAL RESOURCE*

Wild, unroaded areas provide not only high quality recreational opportunities, but also natural landscapes with high aesthetic and scenic qualities and protection of traditional cultural properties from intrusion.<sup>62</sup> Another underappreciated attribute provided by wild lands—quiet—is increasingly rare in a fast paced, cell phone ridden, industrialized society.<sup>63</sup>

Early wilderness proponents Henry David Thoreau and John Muir argued that wild places provide an “antidote to the modern working life” by providing freedom from goal oriented and other-directed mundane tasks, along with opportunities for contemplative reflection, self-reliance and inner-directedness.<sup>64</sup> Thoreau and Muir viewed wilderness as “a sanctuary of freedom, a refuge of sanity in an overcivilized world, and as somewhere to be profoundly humbled.”<sup>65</sup>

Just as the restorative power of a wilderness experience can strengthen individual character; it may also strengthen democracy by fostering an “environmental strain of republican idealism.”<sup>66</sup> The political tradition of “civic republicanism” draws upon an individual’s willingness to sacrifice self-interest in order to participate in government and promote the overall public good.<sup>67</sup> Walt Whitman proclaimed that “[d]emocracy . . . must be . . . fibred, vitalized, by regular contact with out-door light and air and growths, farm scenes, animals, fields, trees, birds, sun-warmth, and free skies, or it will certainly dwindle and pale.”<sup>68</sup>

More recently, environmental ethicists have made a strong case for preserving wild lands based on morality and equity. Arthur Carhart, considered a founder of the modern American wilderness movement, believed that wild areas were part of our national heritage and their preservation was akin to a human right.<sup>69</sup> Contemporary legal scholars, ethicists, and economists make a strong case that, in a world of limited

DEVELOPMENT 13–21 (Comm. Print 1994) (discussing mining subsidies).

<sup>62</sup> Special Areas; Roadless Rule Conservation, 66 Fed. Reg. 3244, 3272 (Jan. 12, 2001) (codified at 36 C.F.R. pt. 294).

<sup>63</sup> Sarah Krakoff, *Mountains Without Handrails . . . Wilderness Without Cellphones*, 27 HARV. ENVTL. L. REV. 417, 422–26 (2003).

<sup>64</sup> *Id.* at 423. Sigurd Olson, another influential wilderness advocate, promoted the “sweat and toil, hunger and thirst, and the fierce satisfaction that only comes with hardship,” as well as the symbolic virtues of wilderness preservation. Sigurd Olson, *Why Wilderness?*, in THE GREAT NEW WILDERNESS DEBATE, *supra* note 1, at 97, 100.

<sup>65</sup> Noss, *supra* note 10, at 410–411 (citing RODERICK NASH, WILDERNESS AND THE AMERICAN MIND (1982)). Conspicuously absent from Thoreau’s famous 1862 essay *Walking* is any discussion of habitat preservation or the needs of wild species; instead, Thoreau fixates on human literature, mythology, history, work and leisure. Turner, *supra* note 18, at 618.

<sup>66</sup> Krakoff, *supra* note 63, at 422 (citing FREDERICK LAW OLNSTEAD, THE YOSEMITE VALLEY AND THE MARIPOSA BIG TREES: A PRELIMINARY REPORT (1865), *reprinted in* 44:1 LANDSCAPE ARCHITECTURE 12 (1983)).

<sup>67</sup> Richard J. Lazarus, *A Different Kind of ‘Republican Moment’ in Environmental Law*, 87 MINN. L. REV. 999, 999 (2003).

<sup>68</sup> Walt Whitman, *Specimen Days: Nature and Democracy—Morality*, in COMPLETE POETRY AND COLLECTED PROSE 925–26 (Justin Kaplan ed., 1982) (1892).

<sup>69</sup> Pete Morton, *The Economic Benefit of Wilderness: Theory and Practice*, 76 DENV. U. L. REV. 465, 492 (1999); Aplet, *supra* note 15, at 359 (citing ARTHUR H. CARHART, PLANNING FOR AMERICA’S WILDLANDS 1 (1961)).

natural resources, the present generation has an obligation to ensure that the welfare of future generations does not fall below its own.<sup>70</sup> Preserving wild lands from development is a necessary means of attaining intergenerational equity. In theory, long-term, equitable distribution of resources could occur without setting aside vast areas of land from development if sustainable use, management, and restoration of natural resources were ensured. Yet the inherent uncertainties about managing resources associated with complex and dynamic ecosystems with non-linear properties make sustainability an elusive goal.<sup>71</sup> Uncertainty makes it difficult both to formulate appropriate responses to environmental problems and to reach consensus on the adoption of those responses. Humans typically deal with uncertainty through "denial and avoidance."<sup>72</sup> Politicians use it as a pretext for inaction and for refusing to invest in conservation initiatives or to limit resource consumption.<sup>73</sup>

Land managers who seek to attain sustainability in the face of uncertainty might prioritize the protection of elements of the ecosystem that are slow-changing and that generate familiar or expected patterns of outcomes.<sup>74</sup> A sustainability strategy should strive toward keeping crucial ecological parameters within historic ranges.<sup>75</sup> Wild land preservation plays an important role in effectuating this goal by providing a baseline from which to measure change and also by providing refugia for species affected by both anticipated and unforeseen effects of development.

### III. FOUNDATIONAL LEGAL CANONS: THE CONSTITUTIONAL POWER FOR PRESERVING FEDERAL PUBLIC LANDS AND THE MUSY PRINCIPLE

#### *A. The Property Clause*

Congress has set the tone of public lands management throughout our nation's history by passing laws requiring either the disposition of the lands and resources or MUSY management. The power to manage public lands and

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<sup>70</sup> Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis and the Discounting of Human Lives*, 99 COLUM. L. REV. 941, 1010–11 (1999) (citing Robert Solow, *An Almost Practical Step Toward Sustainability*, 19 RESOURCES POLICY 162, 167–68 (1993), and Edith Brown Weiss, *Intergenerational Equity: A Legal Framework for Global Environmental Change*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 385, 401–05 (Edith Brown Weiss ed., 1991)).

<sup>71</sup> Daniel A. Farber, *Building Bridges over Troubled Waters: Eco-Pragmatism and the Environmental Prospect*, 87 MINN. L. REV. 851, 858 (2003). "Our desire to manage everything is exceedingly arrogant given our ignorance of how nature works." Noss, *supra* note 10, at 411.

<sup>72</sup> Farber, *supra* note 71, at 882; see HENRY N. POLLACK, UNCERTAIN SCIENCE, UNCERTAIN WORLD 59 (2003) (citing E.O. WILSON, THE FUTURE OF LIFE (2002)) ("To look neither far ahead nor far afield is elemental in a Darwinian sense.").

<sup>73</sup> See POLLACK, *supra* note 72, at 3 ("Waiting until uncertainty is eliminated . . . is an implicit endorsement of the *status quo*, and often an excuse for maintaining it."). A leading example of an international measure floundering in the face of uncertainty is the Kyoto Protocol on climate change; politicians have avoided imposing more stringent pollution-control requirements by claiming uncertainties in anthropocentric causal factors. Farber, *supra* note 71, at 858.

<sup>74</sup> Farber, *supra* note 71, at 880–81.

<sup>75</sup> *Id.*

resources flows from the Property Clause of the Constitution, which provides that "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States."<sup>76</sup> Congress's authority to make all "needful" regulation respecting the public lands has been described as "plenary"<sup>77</sup> and "without limitations."<sup>78</sup> The precise parameters of the Property Clause power have not been well defined, but the clause entails at least those powers of a proprietor of land as well as sovereign police powers.<sup>79</sup>

Congress typically executes its Property Clause power in broad-brush terms, delegating the details of land management to executive branch agencies.<sup>80</sup> Such delegations are routinely upheld.<sup>81</sup> Courts have observed that, like Congress, federal land management agencies possess "*plenary authority* over the administration of public lands."<sup>82</sup>

The breadth of the executive branch's Property Clause power is perhaps best illustrated in *United States v. Grimaud*,<sup>83</sup> where the implementation of Forest Service Organic Administration Act of 1897

<sup>76</sup> U.S. CONST. art. IV, § 3, cl. 2.

<sup>77</sup> Robert L. Glicksman & George Cameron Coggins, *Hardrock Minerals, Energy Minerals and Other Resources on the Public Lands: The Evolution of Federal Natural Resources Law*, 33 TULSA L.J. 765, 781 (1998) (describing Property Clause power as "plenary, unlimited, and preemptive"); see also *Camfield v. United States*, 167 U.S. 518, 525 (1897) (stating that the extent of the Property Clause power is limited only by the exigencies of a particular case).

<sup>78</sup> *United States v. San Francisco*, 310 U.S. 16, 29 (1940); see also *Kleppe v. New Mexico*, 426 U.S. 529 (1976) (describing Congress's broad powers under the Property Clause).

<sup>79</sup> *Camfield*, 167 U.S. at 525; see also *Light v. United States*, 220 U.S. 523, 536 (1911) (affirming injunction against unpermitted grazing in a Forest Reserve, and upholding the government's broad Property Clause powers, stating that "[t]he United States can prohibit absolutely or fix the terms on which its property may be used."). For an in-depth discussion of the nature of the Property Clause, see Peter Appel, *The Power of Congress "Without Limitation": The Property Clause and Federal Regulation of Private Property*, 86 MINN. L. REV. 1 (2001).

<sup>80</sup> See David Epstein & Sharyn O'Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 976 (1999) (noting that, when it comes to environmental law and other highly technical or controversial areas, "Congress has willingly ceded the Executive great leeway . . . as the results of ill-formed policy are often drastic and the political advantages of well-formulated laws are not nearly as evident—they have only a political downside"); see generally Sandra B. Zellmer, *The Devil, The Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941 (2000).

<sup>81</sup> Zellmer, *supra* note 80, at 942; see *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1191 (D. Utah 2004) (noting that the Property Clause "has repeatedly been construed as allowing Congress to delegate its authority to the executive and judicial branches").

<sup>82</sup> *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 336–37 (1963) (emphasis added). The *Best* decision reviewed the Secretary's authority under the General Mining Act of 1872, 30 U.S.C. § 22 (2000), as well as the general powers over public lands granted in Title 43 of the United States Code, but the executive's power over public lands has been described as "plenary" in a variety of contexts. See, e.g., *Sabin v. Berglund*, 585 F.2d 955, 958 (10th Cir. 1978) (finding that Congress may delegate its plenary power over public lands to the Secretary of Agriculture); *Ideal Basic Indust., Inc. v. Morton*, 542 F.2d 1364, 1367 (9th Cir. 1976) (stating that "the Secretary of Interior has broad plenary powers over the disposition of public lands"). Cf. *United States v. Midwest Oil*, 236 U.S. 459 (1915) (recognizing the President's extensive powers to preserve public lands and resources from development).

<sup>83</sup> 220 U.S. 506, 517 (1911).



(Organic Act)<sup>84</sup> was tested and upheld by the Supreme Court. The Organic Act, designed “to improve and protect the forest” and to “secure favorable conditions of water flows,”<sup>85</sup> states that the Secretary of Agriculture “may make such rules and regulations . . . as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.”<sup>86</sup> To achieve these ends, persons entering forest reservations must comply with the regulations.<sup>87</sup>

In response to an indictment for grazing sheep in violation of the regulations, Mr. Grimaud claimed that the Organic Act was so open-ended and broad that it unconstitutionally delegated the legislative function—the power to make law—to an executive entity.<sup>88</sup> The Court recognized that it was “impracticable” for Congress to specify various details of management or determine when activities might be harmful in any given forest.<sup>89</sup> Although Congress cannot delegate to other tribunals “powers which are strictly and exclusively legislative,” it may give authority to those who are directed to act under general legislative provisions “to fill up the details.”<sup>90</sup> Accordingly, the Court found that the Organic Act provided sufficient guidance to the Secretary and avoided the pitfalls of excess delegation.<sup>91</sup>

The executive branch’s authority to withdraw public lands for conservation purposes was tested in *United States v. Midwest Oil*.<sup>92</sup> There, the Court upheld one of the most extensive withdrawals ever accomplished, President Taft’s declaration that 3.6 million acres of public lands would be “off limits” to oil and gas development.<sup>93</sup> According to the Court, the President’s decision was implicitly allowed by congressional acquiescence based on the executive’s “long continued practice” of making withdrawals.<sup>94</sup> Such actions did “no harm to the interest of the public at large,” given that the withdrawal, by denying use of the resource, simply preserved congressional prerogatives and could therefore be subject to legislative reversal.<sup>95</sup> The Supreme Court characterized the President’s power to withdraw public lands from extractive activities as required by “the exigencies of the public service.”<sup>96</sup>

In spite of a general pattern of congressional delegations to the executive branch regarding public lands management, Congress explicitly reserved to itself the power to create the most preservation-oriented

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<sup>84</sup> 16 U.S.C. §§ 473–482, 551 (2000).

<sup>85</sup> *Id.* § 475.

<sup>86</sup> *Id.* § 551.

<sup>87</sup> *Id.* § 478.

<sup>88</sup> *Grimaud*, 220 U.S. at 510.

<sup>89</sup> *Id.* at 516.

<sup>90</sup> *Id.* at 517.

<sup>91</sup> *Id.* at 522; *cf.* *Whitman v. Am. Trucking Ass’n., Inc.*, 531 U.S. 547 (2001) (rejecting a nondelegation challenge to the Clean Air Act).

<sup>92</sup> 236 U.S. 459 (1915).

<sup>93</sup> *Id.* at 468–69.

<sup>94</sup> *Id.* at 469.

<sup>95</sup> *Id.* at 471–72.

<sup>96</sup> *Id.* (citing *Grisar v. McDowell*, 73 U.S. 363 (1867)).

category of public lands: wilderness.<sup>97</sup> Although preserving wild lands is explicitly recognized as national policy in the Wilderness Act and other statutes, maintaining multiple uses and sustained yields of renewable resources on most of the public lands remains a key concern of congressional members.

### *B. MUSY, Biodiversity, and Sustainable Development*

Since the turn of the nineteenth century, the Forest System lands have been managed by Gifford Pinchot's vision, which combined "wise use" and conservation principles in an effort to ensure continual yields of forest products.<sup>98</sup> While resources were plentiful and demands were both low and fairly homogenous, requiring coordination of timber and range resources without significant pressure for other uses, these concepts served the National Forests and the public relatively well. By the 1950s, the Forest Service had begun to face conflicting pressures for forest commodities as well as preservation of natural areas for aesthetic and low impact recreational pursuits.<sup>99</sup> The agency came forward with a proposal for legislation that would mandate multiple-use management to alleviate the otherwise near irreconcilable demands for overuse and limited use or even nonuse.<sup>100</sup> From the agency's perspective, its proposed bill had the added benefit of retaining a good deal of administrative discretion while minimizing the potentially preemptive force of another bill being debated around the same time—an early version of the Wilderness Act.<sup>101</sup>

The proposed bill emerged as the Multiple-Use Sustained-Yield Act of 1960 (MUSYA).<sup>102</sup> The Act embraces both multiple use and sustained yield as official forest policy.<sup>103</sup> The sustained-yield concept, long a cornerstone of resource management, is defined in MUSYA as "the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the national forests without

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<sup>97</sup> See *infra* Part IV.A for a discussion of the Wilderness Act. Congress has also reserved unto itself the power to designate National Parks, a quasi-preservation category that supports both conservation and public enjoyment of the lands. 16 U.S.C. § 1 (2000).

<sup>98</sup> WILKINSON & ANDERSON, *supra* note 53, at 22–23. A sustained-yield standard for federal lands first appeared in federal legislation in the Oregon and California Lands Act of 1937. Michael C. Blumm, *Public Choice Theory and the Public Lands: Why "Multiple Use" Failed*, 18 HARV. ENVTL. L. REV. 405, 423 (1994) (citing Oregon and California Railroad Grant Lands Act, ch. 876, 50 Stat. 874 (1937) (codified as amended at 43 U.S.C. § 1181(a)–(j))). Congress subsequently included a more generally applicable sustained yield requirement in the Sustained Yield Act of 1944, ch. 146, 58 Stat. 132 (codified at 16 U.S.C. § 583 (2000)). This statute, which "had a short life and a limited application," was intended to promote forest industries, employment and rural communities. George Cameron Coggins, *The Law of Public Rangeland Management IV: FLPMA, PRIA, and the Multiple Use Mandate*, 14 ENVTL. L. 1, 35 (1983).

<sup>99</sup> Coggins, *supra* note 98, at 29.

<sup>100</sup> *Id.*

<sup>101</sup> Michael McCloskey, *The Wilderness Act of 1964: Its Background and Meaning*, 45 OR. L. REV. 288, 298 (1966). See *infra* Part IV.A for a discussion of the origins and legislative history of the Wilderness Act.

<sup>102</sup> 16 U.S.C. §§ 528–531 (2000); WILKINSON & ANDERSON, *supra* note 53, at 29.

<sup>103</sup> 16 U.S.C. § 528 (2000).

impairment of the productivity of the land.”<sup>104</sup> Earlier applications of sustained-yield emphasized biophysical constraints on the production of a specific renewable resource, such as timber,<sup>105</sup> to ensure maximum production with little or no regard to wildlife, recreation, or other values.<sup>106</sup> The multiple-use component of the MUSY equation is intended to effectuate a significant change from the production-oriented focus of previous timber management.<sup>107</sup>

Multiple use is defined as “[t]he management of all the various renewable surface resources of the national forests so that they are utilized in the combination that will best meet the needs of the American people.”<sup>108</sup> Under MUSYA, multiple use requires

making the most judicious use of the land for some or all of these resources or related services over areas large enough to provide sufficient latitude for periodic adjustments in use to conform to changing needs and conditions; that some land will be used for less than all resources; and harmonious and coordinated management of the various resources each with the other without impairment of the productivity of the land, with consideration being given to the relative values of the various resources, and not necessarily the combination of uses that will give the greatest dollar return or the greatest unit output.<sup>109</sup>

By requiring that recreation, watersheds, fisheries, and wildlife be given “due consideration” in forest management, the statute seems to place ecological resources on par with timber and forage uses.<sup>110</sup> Other than this cryptic provision for “due consideration,” however, MUSYA gave little guidance to the agency for resolving conflicts among uses, and unrest

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<sup>104</sup> *Id.* § 531(b).

<sup>105</sup> Fred Bosselman, *A Role for State Planning: Intergenerational Equity and Adaptive Management*, 12 U. FLA. J.L. & PUB. POL’Y 311, 313 (2001); Barry Sadler, *Shared Resources, Common Future: Sustainable Management of Canada-United States Border Waters*, 33 NAT. RESOURCES J. 375, 376 (1993). President Theodore Roosevelt, a leader of the early twentieth century conservation movement, viewed sustainability as “foresight and restraint in the exploitation of the physical sources of wealth as necessary for the perpetuity of civilization and the welfare of present and future generations.” SEAN DENNIS CASHMAN, *AMERICA IN THE AGE OF THE TITANS* 78 (1988); Roosevelt and his Forest Service Chief, Gifford Pinchot, promoted sustained yield management as part of a long-range conservation strategy. *See* EDMUND MORRIS, *THE RISE OF THEODORE ROOSEVELT* 714 (1979) (describing Roosevelt’s alliance with Gifford Pinchot).

<sup>106</sup> *See* Elli Louka, *Cutting The Gordian Knot: Why International Environmental Law Is Not Only About The Protection of the Environment*, 10 TEMP. INT’L & COMP. L.J. 79, 113 (1996) (citing ALEXANDER S. MATHER, *GLOBAL FOREST RESOURCES* 185–197 (1990)).

<sup>107</sup> *Sierra Club v. Butz*, 3 Env’tl. L. Rep. (Env’tl. L. Inst.) 20,292, 20,292–93 (9th Cir. 1973); WILKINSON & ANDERSON, *supra* note 53, at 285–87.

<sup>108</sup> 16 U.S.C. § 531(a) (2000).

<sup>109</sup> *Id.*

<sup>110</sup> *See id.* § 529 (2000) (discussing the authorization to develop the national forests for multiple use and sustained yield). In *Butz*, the court stated that “‘due consideration’ . . . requires that the values in question be informedly and rationally taken into balance. The requirements can hardly be satisfied by a showing of knowledge of the consequences and a decision to ignore them.” *Butz*, 3 Env’tl. L. Rep. (Env’tl. L. Inst.) at 20,293.

between developers and preservationists continued virtually unabated.<sup>111</sup> Congress provided clearer management parameters when it passed the National Forest Management Act (NFMA)<sup>112</sup> in 1976. NFMA provides detailed management and planning provisions that guide the agency in seeking the appropriate balance for the mix of forest uses.<sup>113</sup> The statute incorporates MUSY principles, and explicitly includes among the recognized uses in National Forests “coordination of outdoor recreation, range, timber, watershed, wildlife and fish, and wilderness.”<sup>114</sup> These directives have enhanced the opportunity for meaningful judicial review.<sup>115</sup>

Congress extended the MUSY concept to BLM lands when it enacted the Federal Land Policy Management Act of 1976 (FLPMA).<sup>116</sup> FLPMA unifies existing public land laws through comprehensive legislation governing a broad range of activities and expresses a national policy that public lands be managed “on the basis of multiple use and sustained yield.”<sup>117</sup> Like MUSYA, FLPMA defines “sustained yield” as “the achievement and maintenance in perpetuity of a high-level annual or regular periodic output of the various renewable resources of the public lands consistent with multiple use.”<sup>118</sup> “Multiple use,” in turn, is also defined, as in MUSYA, as “a combination of balanced and diverse resource uses that takes into

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<sup>111</sup> WILKINSON & ANDERSON, *supra* note 53, at 286–87. A member of the Public Land Law Review Commission (PLLRC) complained that the phrase “multiple use” can mean “all things to all people,” Charles Conklin, *PLLRC Revisited—A Potpourri of Memories*, 54 DENVER L.J. 445, 448 (1977), and in *Perkins v. Bergland*, the Ninth Circuit concluded that MUSYA “breathes discretion at every pore,” 608 F.2d 803, 806 (9th Cir. 1979) (citing *Strickland v. Morton*, 519 F.2d 467, 469 (9th Cir. 1975)).

<sup>112</sup> 16 U.S.C. §§ 472a, 521b, 1611–1614 (2000); see WILKINSON & ANDERSON, *supra* note 53, at 290 (discussing the “comprehensive” habitat approach of NFMA).

<sup>113</sup> 16 U.S.C. § 1604 (2000); see *infra* Part V.B for a discussion of NFMA’s planning and diversity requirements.

<sup>114</sup> 16 U.S.C. § 1604(e)(1) (2000). NFMA, through MUSYA, adds mineral resources to the mix by stating that “nothing herein shall be construed so as to affect the use or administration of the mineral resources on national forest lands.” *Id.* § 528. It further specifies that persons may enter the forests for all lawful purposes, including mineral development. *Id.* § 478.

<sup>115</sup> See Charles F. Wilkinson, *The National Forest Management Act: The Twenty Years Behind, The Twenty Years Ahead*, 68 U. COLO. L. REV. 659, 667 (1997) (describing NFMA’s strategy for enhancing accountability through judicial review and other means).

<sup>116</sup> 43 U.S.C. §§ 1701–1733 (2000). The Bureau of Land Management (BLM) was formed when the General Land Office and the United States Grazing Service were merged during a government reorganization in 1946. Bureau of Land Management, BLM FACTS, at <http://www.blm.gov/nhp/facts/index.htm> (last visited Nov. 14, 2004). Most BLM lands are located in 12 western states, including Alaska. *Id.* For a discussion of the MUSY doctrine as applied to BLM and other public lands, see George Cameron Coggins, *Of Succotash Syndromes and Vacuous Platitudes: The Meaning of “Multiple Use, Sustained Yield” for Public Land Management*, 53 U. COLO. L. REV. 229 (1981).

<sup>117</sup> 43 U.S.C. § 1701(a)(7)–(8) (2000).

<sup>118</sup> *Id.* § 1702(h). This definition is almost identical to that found in MUSYA, see 16 U.S.C. § 531(b) (2000). Unlike MUSYA, FLPMA’s definition of “multiple use” makes no reference to a non-impairment requirement, see 43 U.S.C. § 1702(h) (2000), but another subsection states that multiple use management must occur “without permanent impairment of the productivity of the land and the quality of the environment,” *id.* § 1702(c).

account the long-term needs of future generations for renewable and nonrenewable resources.”<sup>119</sup>

FLPMA proclaims that the public lands should be managed for MUSY purposes “in a manner which recognizes the Nation’s need for domestic sources of minerals, food, timber, and fiber.”<sup>120</sup> FLPMA also provides that management should “protect the quality of scientific, scenic, historical, ecological, environmental, air and atmospheric, [and] water resources.”<sup>121</sup> More specifically, it recognizes that the preservation of certain lands “in their natural condition” is consistent with MUSY principles.<sup>122</sup>

Whether the MUSY standard as expressed in FLPMA, NFMA and MUSYA has delivered on its promise of balancing the various interests in the public lands and sustaining the land and its resources for present and future generations is the subject of much debate.<sup>123</sup> The changing demands on the federal public lands, coupled with the emerging concern for biodiversity, warrant a closer look at the long-standing MUSY objective. In fact, “[g]iven the absence of either fundamental changes or reforms, some have questioned whether the Forest Service as we know it can survive.”<sup>124</sup> Arguably, the same can be said about BLM.

Professor George Coggins claims that the MUSY standard is not only outmoded, it is in fact dying under its own weight.<sup>125</sup> He attributes its demise, in large part, to the creation of wilderness and other “preservation zones,” so that instead of multiple uses there are really only two major

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<sup>119</sup> 43 U.S.C. § 1702(c) (2000). As with the term “sustained yield,” this definition is quite similar to that found in MUSYA § 531(a), except that FLPMA lists ten specific resources (“recreation, range, timber, minerals, watershed, wildlife and fish, and natural scenic, scientific and historical values”), and refers explicitly to environmental quality in directing that there be no impairment to land and resources. 43 U.S.C. § 1702(c) (2000). Another distinction is that FLPMA § 1702(c) specifies that there be no *permanent* impairment, *id.*, while MUSYA simply forbids impairment, 16 U.S.C. § 531(a) (2000). The notion that FLPMA allows some impairment is echoed in elsewhere in that Act: “[T]he Secretary shall . . . prevent *unnecessary or undue* degradation of the lands.” 43 U.S.C. § 1732(b) (2000) (emphasis added). *See generally* Mineral Policy Ctr. v. Norton, 292 F. Supp. 2d 30, 41 (D.D.C. 2003) (holding that 43 U.S.C. § 1732(b) requires the Secretary of the Interior “to prevent, not only unnecessary degradation, but also degradation that, while necessary. . . , is undue or excessive”).

<sup>120</sup> 43 U.S.C. § 1701(12) (2000).

<sup>121</sup> *Id.* § 1701(a)(8).

<sup>122</sup> *Id.*

<sup>123</sup> *See* Blumm, *supra* note 98, at 408 (arguing that the MUSY standard has failed); Glicksman & Coggins, *supra* note 17, at 393 (making a case for MUSY reform). *See generally* CHARLES F. WILKINSON, CROSSING THE NEXT MERIDIAN (1992) (characterizing federal lands management law, including the MUSY mandate, as “Lords of Yesterday”). Years ago, as Governor of Arizona, Bruce Babbitt stated that “The old concept of multiple use no longer fits the reality of the new west. . . . [It] is not adequate for public lands management.” *See* Blumm, *supra* note 98, at 431 (citing Babbitt’s remarks at the Sierra Club’s 1985 annual meeting).

<sup>124</sup> ROGER A. SEDJO, THE NATIONAL FORESTS: FOR WHOM AND FOR WHAT? 6 (Property & Env’t Research Ctr. Policy Series 23, 2001) (citations omitted), *available at* <http://www.perc.org/pdf/ps23/pdf>. Sedjo explained, “The political pressures influencing Forest Service management and the various interest group struggles for the control of resources have of the forest have made rational management impossible.” *Id.*

<sup>125</sup> Coggins, *supra* note 11, at 188.

categories of uses: commodity production and personal pleasure.<sup>126</sup> Rather than mourn MUSY's passing, Coggins and colleague Robert Glicksman call for a sea-change in federal lands management—a “general overhaul of the jurisdictional boundaries of federal lands.”<sup>127</sup>

Coggins and Glicksman argue there is no longer any compelling justification for retaining four separate land management agencies to govern the various categories of public lands. Beginning with the premise that public lands can be characterized as the source of two kinds of “goods,” commodities and personal pleasure, they claim that consolidation into two categories is an “obvious course of reform.”<sup>128</sup> Under their proposal, the National Park Service and Fish and Wildlife Service would become one preservation-oriented agency to administer lands devoted to non-commodity uses (the national park and national wildlife refuge systems plus all adjacent and free-standing wilderness areas), while the Forest Service and BLM would become one MUSY-oriented agency to manage the remaining public lands, which would remain open to resource extraction activities under conventional MUSY principles.<sup>129</sup>

This approach has at least superficial appeal because it would provide each agency with clear priorities and missions, which may minimize contentious litigation and deadlock over conflicting uses, thereby promoting comprehensive, holistic management strategies. Coggins and Glicksman claim that consolidation would “produce a more efficient administration of federal land policy and far better protection for American wilderness.”<sup>130</sup> But while the proposal may result in more efficient administration of the public lands, simplicity for simplicity's sake is not always a good thing. Competition among agencies can yield significant conservation benefits, while huge, monoculture federal agencies can become complacent and unresponsive to public needs and values.<sup>131</sup> Consolidation into fewer management categories would likely reduce opportunities for innovation and adaptive management.<sup>132</sup> Further, the authors readily admit that “even on national

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<sup>126</sup> *Id.*

<sup>127</sup> Glicksman & Coggins, *supra* note 17, at 393.

<sup>128</sup> *Id.* at 394.

<sup>129</sup> *Id.* Under the proposal of Professors Glicksman and Coggins, public lands necessary for contiguity and preservation of wildlife corridors would be added to the preservation holdings. *Id.*

<sup>130</sup> *Id.* See *infra* Part IV.C for a discussion of the continuing relevance of wilderness.

<sup>131</sup> See John D. Leshy, *The Babbitt Legacy at the Department of the Interior: A Preliminary View*, 31 ENVTL. L. 199, 219 (2001) (predicting that the “greening” of BLM through monument management responsibilities may stimulate competition and enhance the federal conservation agenda). A former Chief of the Forest Service, Max Peterson, concluded that the larger the agency, the more difficult it is to manage and the more likely it is to be politically controlled. Max Peterson, *Does the Forest Service Have a Future*, in *A Vision for the U.S. Forest Service* 191, 200 (Roger A. Sedjo ed., 2000).

<sup>132</sup> See Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 ECOLOGY L.Q. 457, 614–15 (2002) (cautioning against a merger of the Fish and Wildlife Service with the Park Service and noting that “proposals to consolidate public land systems have a history of failure”). Examples of difficult or controversial mergers abound. The long standing turf war between the Federal Bureau of Investigation and the Central Intelligence Agency apparently has not been solved by grouping them together under the

forest and BLM lands, where commodity production . . . has long been the dominant goal, resource exploitation is giving way to recreational and preservation use.”<sup>133</sup> They also acknowledge another complicating factor: The distinction between commodity use and personal pleasure has been blurred by the growth of commercial outfits that provide high-impact recreational outings for tourists.<sup>134</sup>

More importantly, consolidation would not necessarily secure an enduring resource of wild lands, nor would it advance biodiversity goals. Biodiversity “hot spots” can be found where areas are or have been subjected to resource extraction such as timber harvest, grazing or mineral leasing, while they are not necessarily found in high elevation wilderness areas or paved-over National Parks. All federal land management agencies must have a continuing responsibility for inventorying land with biodiversity potential and for protecting wild lands wherever they are found. Neither of the lead MUSY agencies should be excused from preservation obligations, and both the Forest Service and BLM are capable of promoting preservation objectives in managing their lands. Characterizing the Forest Service and BLM as “timber beasts” and “range lords” or the Park Service and Fish and Wildlife Service as “tree huggers” wearing untarnished “white hats” is overly simplistic.<sup>135</sup>

It is true that the Forest Service resisted congressional wilderness designations, and has not always been forthcoming with recommendations for additions to the wilderness system.<sup>136</sup> Yet it was the first agency to create an administrative wilderness system, and its long-standing but little known Research Natural Area (RNA) network exemplifies a commitment to preserve natural areas as a baseline for monitoring ecological changes.<sup>137</sup> In addition, the Forest Service is one of the leading agencies to incorporate science into its planning processes—albeit with the help of congressional

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Department of Homeland Security. See Calvin Woodward, *FBI, CIA Struggle to Put History Behind Them*, BOULDER NEWS, June 2, 2002, <http://community.bouldernews.com/news/terror/may02/02afbi.html>. The effective but ill-fated National Biological Survey, created by secretarial order in 1993, collected scientists from seven agencies to gather information on the extent of the nation’s biological resources, but it was terminated in a 1996 appropriations bill. Daniel C. Esty, *Environmental Protection in the Information Age*, 79 N.Y.U. L. REV. 115, 197 n.289 (2004); see also Frederic H. Wagner, *Whatever Happened to the National Biological Survey*, 49 BIOSCIENCE 219 (1999).

<sup>133</sup> Glicksman & Coggins, *supra* note 17, at 394.

<sup>134</sup> *Id.*

<sup>135</sup> See, e.g., *Wilderness Soc’y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051 (9th Cir. 2003) (reversing the Service’s decision to permit fish stocking in the Kenai Wilderness to enhance nearby commercial fisheries), *amended in part*, 360 F.3d 1374 (2004); *Nat’l Parks and Conservation Ass’n v. Babbitt*, 241 F.3d 722 (9th Cir. 2001) (enjoining the Park Service from implementing a plan to allow up to a 72% increase in cruise ship traffic in Glacier Bay); *Coalition for Canyon Pres. v. Slater*, 33 F. Supp. 2d 1276 (D. Mont. 1999) (enjoining road construction in Glacier National Park).

<sup>136</sup> H. Michael Anderson & Aliki Moncrief, *America’s Unprotected Wilderness*, 76 DENV. U. L. REV. 413, 424 (1999) (finding that the Forest Service has recommended few wilderness additions, e.g., less than 1% of inventoried roadless areas in the Rocky Mountain Region, through its “second generation” forest plan revisions).

<sup>137</sup> See *infra* Part V.B.1 for a discussion of the origins and specifications of the RNA system.

mandates to protect diversity in the forests and to utilize a Committee of Scientists.<sup>138</sup>

Along the same lines, BLM is not just a “Bureau of Livestock and Mining,” as it is sometimes characterized. Moreover, the arid and semi-arid public lands managed by BLM, long thought of as “waste lands,” are surprisingly rich in natural resources. BLM lands provide habitat for thousands of species of wildlife, including over one hundred species that are federally listed as threatened or endangered.<sup>139</sup> They also provide extensive recreational opportunities for millions of people who live in or visit the western states to hike and camp in deserts, mountains, and canyons or to cast their lines in some of the 30,000 miles of fishable streams on BLM lands.<sup>140</sup> But as the BLM moniker suggests, livestock grazing is the most widespread use on BLM lands and it poses the greatest threat to biodiversity and other sustainable public uses.<sup>141</sup> FLPMA provides that grazing shall be a permitted use of BLM lands, but nothing compels that it be permitted on all land managed by the agency.<sup>142</sup>

Today, there is at least some evidence that BLM is becoming a more savvy and caring steward of the land and its resources.<sup>143</sup> The impetus for a metamorphosis was provided by the Clinton Administration, which bestowed the agency with new responsibilities over national landscape monuments.<sup>144</sup> Unfortunately, the agency has been given minimal resources to do the job, and it faces mounting pressure to enhance energy production on the public lands. Yet if Aldo Leopold, a predator control agent early in his career, could become one of the forefathers of modern ecology upon witnessing the “fierce green fire” fading from a dying wolf’s eyes,<sup>145</sup> both

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<sup>138</sup> 16 U.S.C. § 1604(g)(3)(C), (h) (2000). As Professor Charles Wilkinson explained, “[T]he Forest Service is still timber-dominated, and that fact skews every decision to some degree, small or great. Yet timber determines less than before. This is a more open and diverse, and a better, agency. . . . The new winds are blowing strong and will grow ever more hearty.” WILKINSON, *supra* note 115, at 673.

<sup>139</sup> Feller, *supra* note 33, at 704–05.

<sup>140</sup> *Id.* at 705.

<sup>141</sup> *See id.* (“Livestock grazing has radically altered vegetation over tens of millions of acres, destroyed riparian areas, polluted streams, created massive soil erosion, displaced wildlife, desecrated archeological sites, and spoiled prime recreational areas.”); Debra L. Donahue, *Justice for the Earth in the Twenty-First Century*, 1 WYO. L. REV. 373, 385–89 (2001) (describing adverse impacts of grazing). *See supra* note 57 for further information on grazing on BLM land.

<sup>142</sup> *See* Feller, *supra* note 33, at 706 (citing 43 U.S.C. § 1702(c), and the Taylor Grazing Act of 1934, 43 U.S.C. §§ 315–315o-1).

<sup>143</sup> John G. Mitchell, *The Big Open*, NATIONAL GEOGRAPHIC.COM (2001), available at [http://magma.nationalgeographic.com/ngm/data/2001/08/01/html/ft\\_20010801.1.html](http://magma.nationalgeographic.com/ngm/data/2001/08/01/html/ft_20010801.1.html); *see also* Robert B. Keiter, *The Monument, The Plan, and Beyond*, 21 J. LAND, RESOURCES & ENVTL. L. 521, 531 (2001) (noting that the BLM has aggregated its conservation areas into a new National Landscape Conservation System totaling over forty million acres of public land, and observing that this provides at least some evidence of the “greening” of the BLM).

<sup>144</sup> *See* Keiter, *supra* note 143, at 531 (discussing the “greening” of BLM during the Clinton-Babbitt era); Leshy, *supra* note 131, at 219 (describing the Clinton Administration’s efforts to “push BLM into the forefront of the new conservation era”).

<sup>145</sup> *See* ALDO LEOPOLD, *Thinking Like a Mountain*, in A SAND COUNTY ALMANAC AND SKETCHES HERE AND THERE 130 (Oxford Press 1950) (expressing dismay at the extirpation of wolves).



BLM and the Forest Service should be given a chance to fulfill their ecologically oriented responsibilities.

Although the MUSY concept is not yet on its death bed, it has undoubtedly evolved from its commodity-driven origins. Tempered by judicial and executive interpretation, environmental and wildlife protective legislation, and the weight of the public's demands, MUSY is beginning to resemble sustainable development, a concept embraced in international environmental instruments.<sup>146</sup>

The 1987 Brundtland Report, *Our Common Future*, defines sustainable development as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."<sup>147</sup> Sustainable development reorients the use and consumption of natural resources to satisfy intergenerational equity,<sup>148</sup> and attempts to achieve distributive justice by eliminating inequalities among human communities.<sup>149</sup> The sustainable development concept also incorporates a precautionary principle, requiring decision makers to proceed with caution (or not at all) in the face of uncertainty.<sup>150</sup>

While sustainable development has not yet emerged as a new lodestar for our public lands, it may ultimately take the place of, or at least inform, MUSY.<sup>151</sup> If it does, more precise parameters to guide decision-making processes toward ecologically sustainable, equitable results will likely be

<sup>146</sup> The 2002 Johannesburg Declaration on Sustainable Development reaffirmed the international community's commitment to sustainable development. JOHANNESBURG DECLARATION ON SUSTAINABLE DEVELOPMENT (Sept. 4, 2002), [http://www.johannesburgsummit.org/html/documents/summit\\_docs/1009wssd\\_pol\\_declaration.htm](http://www.johannesburgsummit.org/html/documents/summit_docs/1009wssd_pol_declaration.htm). See also UNITED NATIONS DEP'T OF ECON. AND GLOBAL AFFAIRS, GLOBAL CHALLENGE GLOBAL OPPORTUNITY: TRENDS IN SUSTAINABLE DEVELOPMENT 1 ("Since the Rio Earth Summit in 1992, sustainable development has emerged as a new paradigm of development . . . ."), [http://www.johannesburgsummit.org/html/documents/summit\\_docs/criticaltrends\\_1408.pdf](http://www.johannesburgsummit.org/html/documents/summit_docs/criticaltrends_1408.pdf); J.B. Ruhl, *Sustainable Development: A Five-Dimensional Algorithm for Environmental Law*, 18 STAN. ENVTL. L. J. 31, 33 (1999).

<sup>147</sup> WORLD COMMISSION ON ENVIRONMENT AND DEVELOPMENT, OUR COMMON FUTURE 43 (1987) [hereinafter BRUNDTLAND REPORT]. For background on the development of the concept, see John C. Dernbach, *Sustainable Development as a Framework for National Governance*, 49 CASE W. RES. L. REV. 1 (1998). See also Karkkainen, *supra* note 8, at 6 (describing sustainable development and biodiversity as twin themes of international environmental law).

<sup>148</sup> Michael McCloskey, *The Emperor Has No Clothes: The Conundrum of Sustainable Development*, 9 DUKE ENVTL. L. & POL'Y F. 153, 154 (1999); Gunther Handl, *Environmental Security and Global Change: The Challenge to International Law*, 1 Y.B. INT'L ENVTL. L. 20, 29 (1990).

<sup>149</sup> See Graham Mayeda, *Where Should Johannesburg Take Us? Ethical and Legal Approaches to Sustainable Development in the Context Of International Environmental Law*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 29, 31 (2002) (discussing distributional concerns); John C. Dernbach, *Sustainable Development: Now More Than Ever*, 32 ENVTL. L. REP. (Envtl. L. Inst.) 10,003, 10,012 (2002) (describing the United States' disproportionate consumptive patterns).

<sup>150</sup> See A.E. Boyle, *The Gabcikovo-Nagymaros Case: New Law in Old Bottles*, 8 Y.B. INT'L ENVTL. L. 13, 18 (1997) (explaining that sustainable development entails a commitment to public participation, environmental impact assessment, and the precautionary principle).

<sup>151</sup> Barry Sadler, *Shared Resources, Common Future: Sustainable Management of Canada-United States Border Waters*, 33 NAT. RESOURCES J. 375, 376 (1993) (discussing evolution of sustainable development) (citing J. Dixon & L. Fallon, *The Concept of Sustainability: Origins, Extensions, and Usefulness for Policy*, 2 SOC'Y & NAT. RESOURCES 73 (1989)).

necessary.<sup>152</sup> Meanwhile, neither MUSYA nor the more recent NFMA or FLMPA preclude preservation-oriented priorities, and all three statutes recognize wildness and wildlife species as legitimate concerns.<sup>153</sup> A comprehensive wild lands system could provide the biodiversity core in the development of a broader policy that promotes sustainable development.<sup>154</sup>

#### IV. PRESERVING WILD LANDS THROUGH CONGRESSIONALLY DESIGNATED WILDERNESS AREAS

Congress has taken a lead role in the preservation agenda by designating over 650 wilderness areas, the most protected of all federal lands.<sup>155</sup> Paradoxically, wilderness has been characterized as one of the “seven wonders” of environmental law,<sup>156</sup> but also as “an albatross around the neck of contemporary conservationists.”<sup>157</sup> The wilderness system envelops 106 million acres of land in forty-four states.<sup>158</sup> For the sake of perspective, total federal public land amounts to over 600 million acres,

<sup>152</sup> See McCloskey, *supra* note 148, at 159 (“[W]e need a useable line of thought—an operational reality . . . which can be extended rationally into the detail of research, planning and application.”); Mayeda, *supra* note 148, at 31 (“The coherence of the principle of sustainable development is of real concern.”); see also Ruhl, *supra* note 145, at 36 (“The fusion of the three parameters [environment, economy, and equity] prevents sustainable development from cascading back into the resourcism–environmentalism dichotomy, and ensures that social equity has equal footing with environmental and economic goals.”).

<sup>153</sup> See *supra* notes 108–109 and accompanying text (defining multiple use). Part V.B, *infra*, provides a discussion of the ecological requirements of NFMA and MUSYA.

<sup>154</sup> The National Wildlife Refuge System and National Parks are necessary complements, see Robert L. Fischman, *The National Wildlife Refuge System and the Hallmarks of Modern Organic Legislation*, 29 *ECOLOGY L.Q.* 457, 563–70 (2002) (discussing significance of Forest Service policy and regulations to the National Wildlife Refuge System); Karkkainen, *supra* note 8, at 41, as are the Endangered Species Act’s requirements for listed species, see 16 U.S.C. §§ 1536, 1538 (2000) (requiring consultation for federal actions to avoid jeopardy and prohibiting the “take” of listed species).

<sup>155</sup> GORTE, *supra* note 10, at 1. There were 649 wilderness areas as of December 31, 2001, *id.* at 4. In 2002, the 107th Congress expanded the National Wilderness Preservation System by nearly 530,000 acres through additions in California, Colorado, South Dakota, and Nevada. AMERICAN WILDERNESS COALITION, WILDERNESS REPORT CARD 2004, at 37 (2004) [hereinafter WILDERNESS REPORT CARD], [http://www.americanwilderness.org/wildcard/2004/wild\\_card\\_03.pdf](http://www.americanwilderness.org/wildcard/2004/wild_card_03.pdf).

<sup>156</sup> William H. Rodgers, Jr., *The Seven Statutory Wonders of U.S. Environmental Law: Origins and Morphology*, 27 *LOY. L. A. L. REV.* 1009, 1009–10 (1994). Professor Rodgers includes the Wilderness Act because it is highly controversial and yet virtually repeal-proof, and because it “has given rise to a tenfold expansion in protected acreage since 1964 . . . and coincidentally offers the opportunity to secure advances in the protection of North American biodiversity.” *Id.* at 1010–12.

<sup>157</sup> Waller, *supra* note 10, at 540. Waller attributes this view to J. Baird Callicott and William Cronon. See *id.* (citing Callicott & Nelson, *Introduction*, *supra* note 1, at 12–13, and William Cronon, *The Trouble with Wilderness; or, Getting Back to the Wrong Nature*, in UNCOMMON GROUND: THE HUMAN PLACE IN NATURE 69–90 (William Cronon ed., 1995)) (noting that cultural and historical notions of wilderness hinder modern conservation movement).

<sup>158</sup> WILDERNESS REPORT CARD, *supra* note 154, at 2. Fifty-five percent of all wilderness lands is found in Alaska. GORTE, *supra* note 10, at 1.

which is one-third of the nation's total land base.<sup>159</sup> Nearly 35 million acres, about 30 percent of the wilderness system, are within National Forests.<sup>160</sup> The BLM manages only around six percent of the system, while the National Park Service manages over 41 percent and the FWS manages about 23 percent.<sup>161</sup> Although this sounds like a vast preservation system, in actuality, less than three percent of the land base in the contiguous 48 states has been given official wilderness status.<sup>162</sup>

Edward Abbey's proclamation that "wilderness needs no defense, only more defenders"<sup>163</sup> may have once been true. Yet, as the Wilderness Act comes under increasing attack, both overtly and by neglect, a clearly articulated *raison d'être* becomes necessary.

### A. Wilderness Act Designation Criteria

In 1964, when the Wilderness Act was passed, Congress was concerned about the anthropocentric virtues of wild lands rather than the teachings of conservation biology, which were not well publicized until much later.<sup>164</sup> Two driving forces provided the impetus for the Act: the public's desire to preserve lands for growing recreational demands<sup>165</sup> and the sponsors' desire to curtail agency discretion to create or dismantle administrative preserves.<sup>166</sup> The latter concern motivated Congress to delineate carefully the role of the Departments of Agriculture and the Interior: to study and report on suitability of lands for inclusion in the system.<sup>167</sup> By explicitly providing that only Congress may designate wilderness areas for inclusion in the national wilderness system, the Act provides a relatively rare example of congressional refusal to delegate management authority to the executive branch.<sup>168</sup>

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<sup>159</sup> Five Federal Agencies to Give National Public Lands Day Volunteers a "Fee-Free" Day, at <http://www.npld.com/doc/feefreerelease.doc> (last visited Nov. 14, 2004).

<sup>160</sup> GORTE, *supra* note 10, at 15. Wilderness comprises around 18% of all Forest Service land. *Id.* For a discussion of early preservation efforts in the National Forest System, and their relationship to the wilderness movement, see *infra* Part V.B.1.

<sup>161</sup> GORTE, *supra* note 10, at 15.

<sup>162</sup> Noss, *supra* note 4, at 526. Only 12% of federal land outside of Alaska (about 2.5% of all land in the contiguous United States) has been designated as wilderness. GORTE, *supra* note 10, at 1.

<sup>163</sup> Noss, *supra* note 4, at 525.

<sup>164</sup> See Callicott & Nelson, *supra* note 1, at 13 (stating that the original justification for wilderness preservation was primarily to provide resources for nonconsumptive human uses: "virile recreation"; aesthetic enjoyment; character building; civic republicanism; solitude and spiritual respite).

<sup>165</sup> See SUTTER, *supra* note 51, at 16. Sutter's historical analysis focuses on the four founders of the Wilderness Society—Aldo Leopold, Bob Marshall, Benton McKaye, and Robert Sterling Yard—and their concern about the threats to peoples' relationship with nature posed by consumerism and commercialized recreation made possible by automobiles. *Id.* at 239–43.

<sup>166</sup> McCloskey, *supra* note 101, at 298.

<sup>167</sup> 16 U.S.C. § 1132 (2000).

<sup>168</sup> *Id.* § 1131(a). See *supra* Part III.A for a discussion of the delegations of Property Clause power.

The recreational motivation for the Act's passage played a significant role in the delineation of criteria for wilderness consideration. Howard Zahniser of the Wilderness Society, widely credited as the ghostwriter of the Act, initially promoted the need for a scientific baseline in his arguments for an official wilderness system, but this justification was barely a footnote in the debates leading to enactment.<sup>169</sup> Even Aldo Leopold, a well-known proponent of wild lands preservation, relied on recreational goals to justify protection: "The argument for . . . wilderness areas is premised *wholly* on highest recreational use."<sup>170</sup> Leopold added that wilderness areas should occupy only a small portion of the total national forest system, but each one should be "big enough to absorb a two weeks' pack trip."<sup>171</sup>

Ecological values rate only a few words in the final version of the Wilderness Act.<sup>172</sup> The Act defines wilderness in terms of its undeveloped character, remoteness, and size. More specifically, wilderness is "an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain."<sup>173</sup> The Act's selection criteria reflect this definition by delineating a list of qualifying factors:

[U]nderdeveloped Federal land retaining its primeval character and influence, without permanent improvements or human habitation, . . . which (1) generally appears to have been affected primarily by the forces of nature, with the imprint of man's work substantially unnoticeable; (2) has outstanding opportunities for solitude or a primitive and unconfined type of recreation; (3) has at least 5,000 acres of land or is of sufficient size as to make practicable its preservation and use in an unimpaired condition; and (4) may also contain ecological, geological, or other features of scientific, educational, scenic, or historical value.<sup>174</sup>

Although the criteria specified in the Wilderness Act promote the inclusion of lands "untrammelled" by long-lasting human intrusions such as roads, they fail to ensure that lands with the most biodiversity potential are included within the system. The elevation of recreational and aesthetic concerns over biodiversity objectives comes at a cost. Remoteness, rough terrain, and spectacular scenery are especially desirable for "virile" recreation, such as rock climbing and hiking;<sup>175</sup> consequently, the wilderness

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<sup>169</sup> Grumbine, *supra* note 51, at 605.

<sup>170</sup> Aldo Leopold, *The Wilderness and its Place in Forest Recreational Policy*, 19 J. FORESTRY 718, 719 (1921) (emphasis added).

<sup>171</sup> *Id.*; see Noss, *supra* note 10, at 408–09 (describing Leopold's early views); Grumbine, *supra* note 51, at 602 (describing Leopold's early justifications for wild land preservation).

<sup>172</sup> Grumbine, *supra* note 51, at 606. Section 1131 states that the wilderness areas *may* possess "ecological, geological, or other features of scientific . . . value." 16 U.S.C. § 1131(c)(4) (2000). Section 1131 also refers to the preservation of "natural conditions" twice, *see id.* § 1131(a), (c), while section 1133 enumerates scientific and conservation purposes among its list of six purposes for wilderness areas, *see id.* § 1133(d).

<sup>173</sup> 16 U.S.C. § 1131(c) (2000).

<sup>174</sup> *Id.*

<sup>175</sup> Callicott & Nelson, *supra* note 1, at 14; *see also* SUTTER, *supra* note 51, at 194 (describing Bob Marshall's view of wilderness as "a place of masculine physicality, of direct bodily engagement with the natural world").

system generally protects scenic areas of “rock and ice” rather than wetlands, grasslands and other more biologically productive but less visually spectacular areas.<sup>176</sup>

To satisfy both biodiversity and sustainable development objectives, the preservation of biologically rich areas, wherever they are found, should take priority in public lands management. Ideally, conservation biology—the science of biological diversity—should guide the identification, designation and management of wilderness areas and other preserves.<sup>177</sup> The Act’s failure to utilize scientific criteria for the identification and designation of wilderness areas, in effect, provides only a cursory snapshot of wild lands frozen in time as an artificial human construct rather than dynamic, functioning ecosystems. And although conservation biology recognizes the importance and inevitability of disturbance and change, the management directives expressed in the Act assume that a preserved ecosystem will remain in a desired, steady-state condition.<sup>178</sup>

Once wilderness areas are designated, the Act governs the management of activities in these areas to ensure that wilderness characteristics are maintained. New mineral leases, mechanized means of transport and commercial activities are precluded.<sup>179</sup> Grazing, perhaps the most pervasive incursion, is allowed to continue in most wilderness areas, as is pre-1980 mining.<sup>180</sup> The Act also allows a good deal of discretion on the part of the

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<sup>176</sup> See Dave Foreman, *Wilderness: From Scenery to Nature*, in THE GREAT WILDERNESS DEBATE, *supra* note 1, at 568, 571 (discussing the character of the National Wilderness and Parks Systems); see also Douglas E. Booth, *Timber Dependency and Wilderness Selection: The U.S. Forest Service, Congress, and the RARE II Decisions*, 31 NAT. RESOURCES J. 715 (1991); Chen, *supra* note 24, at 544; Callicott & Nelson, *supra* note 1, at 592. Callicott and Nelson note that “the biome most neglected by the . . . wilderness preservation movement is surely the Great Plains. No monumental scenery, no wilderness designation.” *Id.* The absence of significant wilderness classifications in the Great Plains, however, might also be explained by the prevalence of private land ownership in the region.

<sup>177</sup> Callicott & Nelson, *supra* note 1, at 14; see Karkkainen, *supra* note 8, at 9 (proposing the creation of “a new category of federally owned and managed biological reserves, carved out of current federal landholdings, as well as other lands acquired expressly for that purpose and managed primarily to protect representative ecosystems”); Waller, *supra* note 10, at 561 (concluding that science can provide “a rigorous, cohesive, and ethically defensible basis for choosing and managing wild areas”); Zellmer & Johnson, *supra* note 7, at 486–87 (discussing biodiversity criteria for selecting publicly conserved land).

<sup>178</sup> J. Baird Callicott, *Should Wilderness Areas Become Biodiversity Preserves?*, in THE GREAT NEW WILDERNESS DEBATE, *supra* note 1, at 585, 587.

<sup>179</sup> 16 U.S.C. § 1133(c)–(d) (2000); see also 30 U.S.C. § 181 (2000) (governing on-shore mineral leasing on federal lands). The prohibition on commercial activities has been construed broadly. See *Wilderness Soc’y v. United States Fish & Wildlife Serv.*, 353 F.3d 1051 (9th Cir. 2003) (reversing FWS’s decision to permit fish stocking by a non-profit association in the Kenai Wilderness as an impermissible “commercial enterprise” to enhance nearby commercial fisheries), *amended in part*, 360 F.3d 1374 (2004).

<sup>180</sup> See 16 U.S.C. § 1133(d)(4) (2000) (“[T]he grazing of livestock, where established prior to Sept. 3, 1964, shall be permitted to continue”). In 1998, BLM authorized grazing permits for 164 million of its 264 million acres. U.S. DEP’T OF THE INTERIOR, BUREAU OF LAND MANAGEMENT HIGHLIGHTS, at [http://www.doi.gov/pfm/acct98/high\\_blm.html](http://www.doi.gov/pfm/acct98/high_blm.html) (last visited Nov. 14, 2004). Preexisting mining practices can continue as well. See 16 U.S.C. § 1133(d)(3) (2000); see also Kenneth Hubbard et al., *The Wilderness Act’s Impact on Mining Activities: Policy Versus Practice*, 76 DENV. U. L. REV. 591, 599 (1999) (noting that although the Wilderness Act withdrew

land management agency to employ measures, including temporary roads and mechanized transport, to control fire, disease and insect infestation.<sup>181</sup> Even so, wilderness designation leads to the most restrictive management prescriptions for any category of federal public lands.<sup>182</sup>

### *B. Forest Service and BLM Wilderness Areas*

In practice, as in concept, the wilderness designation process has not fully effectuated biodiversity goals. Rather than forming the centerpiece of a coordinated, comprehensive inventory of biological characteristics, many wilderness areas were created by Congress because they were near and dear to “friends in high places,”<sup>183</sup> or because they were either devoid of valuable minerals or timber, or their remote locations prevented easy resource extraction, thereby diminishing resistance from development interests.<sup>184</sup> To the extent that wilderness designation threatened development potential, congressional compromise provisions have been crafted to allow a variety of nonconforming activities in individual wilderness areas, from backcountry air strips and jet boats in the Frank Church–River of No Return Wilderness<sup>185</sup> to the use of trucks and helicopters to survey game species and maintain “guzzlers” in Nevada’s Mojave Desert Wilderness,<sup>186</sup> to mechanized portages in the Boundary Waters Canoe Area Wilderness.<sup>187</sup>

The agencies’ track records with wilderness implementation are equally spotty. The Forest Service has the longest history with wilderness recommendations and designations. All nine million acres classified as wilderness or wild under the Forest Service’s pre-enactment regulations were designated as “instant” wilderness areas upon passage of the Wilderness Act.<sup>188</sup> The Act directs the Secretary of Agriculture to study and

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land from the operation of the mining law after 1983, mining rights that predate the withdrawal continue).

<sup>181</sup> 16 U.S.C. § 1133(d)(1) (2000). Agencies may take measures that “may be necessary,” subject to “such restrictions as the Secretary deems desirable.” *Id.* Recent proposals would expand such measures well beyond fire, disease and infestation to allow Border Patrol agents to utilize aircraft, motorcycles and other means of surveillance along the U.S.–Mexico border. Mitch Tobin & Michael Marizco, *Border Patrol Could Get More Public Lands Access*, ARIZ. DAILY STAR, Mar. 19, 2004, <http://www.dailystar.com/dailystar/dailystar/14487.php>.

<sup>182</sup> See *Wilderness Soc’y*, 353 F.3d at 1062–63 (reversing FWS’s decision to permit fish stocking in wilderness even though the effects appeared relatively benign).

<sup>183</sup> Foreman, *supra* note 176, at 571.

<sup>184</sup> In one of the earliest writings on wilderness in the Natural Forest System, Aldo Leopold stated that “only areas naturally difficult of ordinary industrial development should be chosen.” Leopold, *supra* note 170, at 719.

<sup>185</sup> Matt Jenkins, *The Wild Card*, HIGH COUNTRY NEWS, Mar. 3, 2003, at 1, 10; Hotlines, *Jetboats Stir Up the Frank*, HIGH COUNTRY NEWS, Apr. 26, 2004, at 5.

<sup>186</sup> Clark County Conservation of Public Lands and Natural Resources Act of 2002, Pub. L. No. 107-282, 116 Stat. 2003. See also Jenkins, *supra* note 185, at 10 (describing concessions made to hunting proponents). A “guzzler” is an artificial watering hole. *Id.*

<sup>187</sup> See *Friends of Boundary Waters Wilderness v. Robertson*, 978 F.2d 1484, 1485 (8th Cir. 1992) (describing portages); see also *Friends of the Boundary Waters Wilderness v. Dombeck*, 164 F.3d 1115, 1121 (8th Cir. 1999) (describing motorboat usage).

<sup>188</sup> 16 U.S.C. § 1132(a) (2000). The Act also designated “canoe” areas, a reference to the

report on the suitability of five million acres of primitive areas to the President.<sup>189</sup> The President must advise Congress with respect to these areas, and a recommendation for designation becomes effective only by an Act of Congress.<sup>190</sup>

In addition, upon passage of the Wilderness Act, the Forest Service embarked on two successive wilderness suitability studies, known as RARE I and RARE II. RARE I, conducted in 1971, identified 56 million acres of roadless areas in the national forests that might qualify for inclusion in the wilderness system.<sup>191</sup> Over 12 million acres were recommended for wilderness designation, while other inventoried roadless areas were classified as wilderness study areas (WSAs) to be withheld from final disposition pending further review, and still others were to be released and made available for multiple uses such as timber harvest and mining.<sup>192</sup> The Forest Service was enjoined from releasing the latter category until it prepared an environmental impact statement (EIS)<sup>193</sup> under the National Environmental Policy Act (NEPA).<sup>194</sup>

In 1977, the Forest Service initiated RARE II to accelerate additions to the wilderness system and to clarify the role of commercial interests in National Forests.<sup>195</sup> The RARE II surveys recommended over 15 million acres in nearly 3,000 roadless areas as wilderness, while 11 million acres were slated for further study and 36 million acres for uses other than wilderness.<sup>196</sup> In *California v. Block*,<sup>197</sup> the Ninth Circuit determined that the EIS for RARE II was inadequate due to lack of site-specific analysis, failure to address public comments and an inadequate range of alternatives.<sup>198</sup> Once again, the release of wilderness-eligible tracts for multiple uses was enjoined, effectively precluding road building and logging in 36 million acres of national forests and prompting Congress to enact a series of statewide wilderness bills in the 1980s.<sup>199</sup>

The Forest Service continues to review land allocations during its regular planning processes and, under the Act, Congress may consider

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Boundary Waters in northern Minnesota. *Id.* For a discussion of wild lands protected under the Forest Service's pre-enactment regulations, see *infra* Part V.B.1.

<sup>189</sup> 16 U.S.C. § 1132(b) (2000). This study was to be completed within ten years. *Id.*

<sup>190</sup> *Id.*

<sup>191</sup> Richard Bury & Gary Lapotka, *The Making of Wilderness: Land Use and the National Forest System*, ENV'T, Dec. 1979, at 14.

<sup>192</sup> *Id.*

<sup>193</sup> National Environmental Policy Act of 1969, 42 U.S.C. § 4332 (2000); see also *Wyoming Outdoor Coordinating Council v. Butz*, 484 F.2d 1244, 1249 (10th Cir. 1973) (finding that the Forest Service must prepare an EIS for timber sales from a roadless area within the Teton National Forest).

<sup>194</sup> National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4370(e) (2000).

<sup>195</sup> Bury & Lapotka, *supra* note 191, at 15.

<sup>196</sup> Michael McCloskey & Jeffrey Desautels, *A Primer on Wilderness Law and Policy*, 13 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,278, 10,278 (1983).

<sup>197</sup> 690 F.2d 752 (9th Cir. 1982).

<sup>198</sup> *Id.* at 760-774.

<sup>199</sup> Nineteen wilderness bills were enacted in the 1980s, adding nearly nine million acres to the wilderness system, based largely on the RARE II allocations. See Anderson & Moncrief, *supra* note 136, at 420.

wilderness proposals for National Forest lands at any time.<sup>200</sup> The process for evaluating potential wilderness areas is set forth in the Forest Service Handbook, which provides a checklist of criteria for wilderness review.<sup>201</sup> Foremost in the evaluation of wilderness potential is the identification and inventory of roadless areas.<sup>202</sup> Areas that have “improved roads maintained for travel by standard passenger-type vehicles” are disqualified, but airstrips, electronic installations, structural improvements such as fences and water troughs, and evidence of mining or timber harvest do not necessarily preclude wilderness consideration.<sup>203</sup>

While the Forest Service had the earliest experiences with wilderness designations, the Department of the Interior now manages nearly seventy percent of the wilderness system.<sup>204</sup> The Wilderness Act provides for review and recommendations regarding roadless areas of five thousand acres or more within National Parks and Wildlife Refuges.<sup>205</sup> BLM lands were addressed subsequently in FLPMA, which directs the Secretary of the Interior to review “roadless areas of five thousand acres or more and roadless islands of the public lands” identified as having characteristics described in the Wilderness Act.<sup>206</sup>

In a startling move that could open millions of acres of roadless lands to development and irreversible degradation of wild qualities and biodiversity, the Department of the Interior recently announced, as the result of a settlement with the state of Utah, it would no longer identify potential wilderness areas on BLM lands for recommendation to Congress.<sup>207</sup> Its

<sup>200</sup> 16 U.S.C. § 1132(b), (e) (2000); McCloskey, *supra* note 101, at 11.

<sup>201</sup> U.S. DEPT OF AGRIC., FOREST SERVICE HANDBOOK 1909.12, at 7 (1992) [hereinafter HANDBOOK], <http://www.fs.fed.us/im/directives/fsh/1909.12/1909.12.7.txt>; *see also* U.S. DEPT OF AGRIC., FOREST SERVICE MANUAL §§ 2320–2322 (1990) [hereinafter MANUAL] (containing direction for the portions of the National Forest System designated by Congress as units in the National Wilderness Preservation System), <http://www.fs.fed.us/im/directives/fsm/2300/2320.1-2323.26b.txt>.

<sup>202</sup> HANDBOOK, *supra* note 201, at 7.1.

<sup>203</sup> *Id.* at 7.11(3), 7.11a(1)–(11).

<sup>204</sup> *See supra* notes 158–59 and accompanying text for information on the percentage of wilderness in each public land category.

<sup>205</sup> 16 U.S.C. § 1132(c) (2000). Public notice and hearings must be provided for all Secretarial recommendations. *See id.* § 1132(d); 43 U.S.C. § 1782(a) (2000).

<sup>206</sup> 43 U.S.C. § 1782 (2000).

<sup>207</sup> *See* Timothy Egan, *Bah, Wilderness! Who Needs Frontier Development?*, MILWAUKEE J. SENTINEL, May 11, 2003, at A1 (describing treatment of wilderness study areas); *Utah v. Norton*, Stipulation and Joint Motion to Enter Order Approving Settlement, No. 2:96CV0870B (D. Utah Apr. 11, 2003) ¶¶ 3–4, 7, 14 (DOI agrees not to “establish, manage, or otherwise treat public lands” as WSAs or Wilderness absent congressional designation, but may continue to inventory characteristics associated with the concept of wilderness), <http://www.tws.org/Library/Documents/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=4667>. Ironically, the settlement followed on the heels of Secretary Babbitt’s successful defense of the BLM’s continuing wilderness inventory in *Utah v. Babbitt*, 137 F.3d 1193 (10th Cir. 1998) (dismissing state’s bid for an injunction against BLM’s inventory of wilderness-quality lands). *See* Michael C. Blumm, *The Bush Administration’s Sweetheart Settlement Policy: A Trojan Horse Strategy for Advancing Commodity Production on Public Lands*, 34 *Envtl. L. Rep.* (Envtl. L. Inst.) 10,397, 10,404–07 (2004) (describing impetus and effects of the Utah settlement).



rationale is that section 1782 of FLPMA, which imposes a deadline on BLM for reviewing its lands for wilderness inclusion, strips the BLM of any discretionary authority for ongoing inventories and recommendations.<sup>208</sup> The settlement has been appealed by wilderness advocates on grounds that it contradicts the plain language of FLPMA and congressional intent underlying wilderness study, recommendation and designation processes.<sup>209</sup> Section 1711 explicitly directs BLM to maintain an inventory of its lands “on a continuing basis.”<sup>210</sup> The ongoing inventory is the cornerstone for all land management decisions under FLPMA.<sup>211</sup> Congress specifically required BLM to include outdoor recreation and scenic values in its inventory and give “priority to Areas of Critical Environmental Concern,” a designation for which wilderness quality lands certainly qualify.<sup>212</sup> Moreover, the objectives of both the Wilderness Act and FLPMA, along with subsequent agency action and congressional approval, support ongoing inventories of wild lands and wilderness recommendations on all qualifying public lands,<sup>213</sup> including eastern lands that may be relatively small or degraded and areas that have been restored to a natural condition.<sup>214</sup>

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<sup>208</sup> 43 U.S.C. § 1782 (2000).

<sup>209</sup> *Utah v. Norton*, No. 03-4147 (10th Cir. 2004) (appeal by Southern Utah Wilderness Alliance et al.).

<sup>210</sup> 43 U.S.C. § 1711 (2000).

<sup>211</sup> *Id.*; see also *id.* § 1712(c)(4) (directing BLM to “rely, to the extent it is available, on the inventory of the public lands, their resources, and other values” in preparing land use plans).

<sup>212</sup> 43 U.S.C. § 1712(c)(3) (2000). See *infra* Part V.B.1.c for a discussion of Areas of Critical Environmental Concern.

<sup>213</sup> See *Block*, 690 F.2d at 757 n.2. The Wilderness Act imposed a deadline on the Forest Service and Park Service as well, see 16 U.S.C. § 1132(a)–(e) (2000), but both agencies have continued to inventory their lands and make recommendations to Congress. See *Block*, 690 F.2d at 762–73 (implicitly recognizing the Forest Service’s continuing authority to conduct reviews of its roadless areas after the Wilderness Act’s ten year deadline); *Sierra Club v. Watt*, 608 F. Supp. 305, 341–43 (E.D. Cal. 1985) (rejecting Secretary Watt’s decision to negate wilderness recommendations of roadless areas less than 5,000 acres and holding that BLM has discretionary authority to make wilderness recommendations and to manage suitable lands to protect their wilderness qualities). Congress has acted affirmatively on several of those recommendations. See, e.g., Colorado Wilderness Act of 1993, Pub. L. No. 103-77, 107 Stat. 756; California Desert Protection Act of 1994, P.L. 103-433, 108 Stat. 4471; Spanish Peaks Wilderness Act of 2000, Pub. L. No. 106-456, § 2(a), 114 Stat. 1955. Of course, Congress could have passed legislation providing for a one-time designation of wilderness areas, but opted instead for an ongoing process. JOHN C. HENDEE & CHAD DAWSON, WILDERNESS MANAGEMENT: STEWARDSHIP AND PROTECTION OF RESOURCES AND VALUES 109–10, 147–51 (3d ed. 2002); see PUBLIC LAND LAW REVIEW COMM’N, ONE THIRD OF THE NATION’S LAND 199 (1970) (“[N]othing in the Wilderness Act . . . preclude[s] additions to the National Wilderness Preservation System of lands not previously identified.”).

<sup>214</sup> See Endangered American Wilderness Act of 1978, 92 Stat. 40, H.R. REP. NO. 540 (95th Cong., 1st Sess. 4–6 (1977)) (stating that wilderness can include areas where a “trace of man’s activity” is present); Eastern Wilderness Act of 1975, Pub. L. No. 93-622, 88 Stat. 2096 (codified at 16 U.S.C. § 1132 (2000)) (recognizing that although lands in highly developed eastern states may not meet the standards for wilderness described in the Wilderness Act, both because they were small and had experienced significant human impacts, they would still be important additions to the wilderness system). Defining wilderness as an immutable, pristine place with no trace of human activity is unduly restrictive, for not even the most remote corners of Antarctica and Siberia are completely unmarked by human activity. B. MCKIBBEN, THE END OF

One important area that could be adversely affected by the Department's anti-wilderness sentiment is the Otero Mesa in southern New Mexico.<sup>215</sup> The Mesa includes thousands of acres of biologically rich Chihuahuan Desert grassland that supports hundreds of bird species, as well as one of the nation's most genetically pure herds of pronghorn.<sup>216</sup> Although there is strong local support for wilderness designation on the Mesa, there has been no formal proposal to date.<sup>217</sup> The New Mexico Wilderness Alliance surveyed the area and determined that over 460,000 acres qualify as wilderness.<sup>218</sup> The state Oil and Gas Association sees things a little differently, describing the Mesa as "potentially one of the largest new gas finds in the western United States."<sup>219</sup> When developers asked BLM to put more land up for lease in 1998, BLM's Las Cruces office initially denied the request.<sup>220</sup> Just a few years later, the Bush Administration announced plans to open more federal land to oil and gas development, and New Mexico Senator Pete Domenici, Chairman of the Energy and Resources Committee, expressed his support for drilling on Otero Mesa.<sup>221</sup> In an atypical move for a state heavily dependent on its mineral resources, New Mexico Governor Bill Richardson signed an executive order calling for wilderness designation, stating his opposition to drilling, and directing state agencies to deny permits for waste pits and to tighten criteria for water wells in the area.<sup>222</sup> The Mesa's future remains unclear, but wilderness designation is unlikely so long as the Utah settlement holds.<sup>223</sup>

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NATURE 55 (1989).

<sup>215</sup> Tania Soussan, *More Otero Mesa Drilling OK'd*, ALBUQUERQUE J., Jan. 6, 2004, at D3.

<sup>216</sup> *Id.*; see Stephen Capra, *Coalition for Otero Mesa—Wildlife and Critical Habitat*, available at <http://www.oteromesa.org/wildlife.htm> (last visited Sept. 24, 2004) (describing the Baird's sparrow (*Ammodramus bairdii*), lark bunting (*Calamospiza melanocorys*), Cassin's sparrow (*Aimophila cassinii*), and burrowing owl (*Athene cunicularia*) as affected species).

<sup>217</sup> Soussan, *supra* note 215, at D3; Egan, *supra* note 207, at A1.

<sup>218</sup> Egan, *supra* note 207, at A1.

<sup>219</sup> The Yates Company claims that it discovered an estimated one trillion cubic-feet of natural gas under the surface of the Otero Mesa, enough to supply one-twentieth of U.S. annual consumption. Laurel Jones, *Gas Industry Gambles on New Mexico Mesa*, HIGH COUNTRY NEWS, Sept. 10, 2001, at 4.

<sup>220</sup> *Id.*

<sup>221</sup> Egan, *supra* note 207, at A1.

<sup>222</sup> Exec. Order No. 2004-005 (Jan. 31, 2004),

[http://www.governor.state.nm.us/2004/executiveorders/orders/EO\\_2004\\_005.pdf](http://www.governor.state.nm.us/2004/executiveorders/orders/EO_2004_005.pdf). See Bobby Magill, *New Mexicans take a Stand Against Oil and Gas*, HIGH COUNTRY NEWS, Mar. 29, 2004, at 4 (describing Richardson's surprise appearance at an environmental rally, during which he signed the executive order). Meanwhile, Governor Richardson sent a letter to Interior Secretary Gale Norton, stating that he would remain opposed to drilling unless the BLM conducts a new wilderness study on the Mesa. WILDERNESS SOC'Y, WILDERNESS REPORT NO. 88, NEW MEXICO GOVERNOR RICHARDSON CALLS FOR WILDERNESS PROTECTION FOR OTERO MESA GRASSLAND (Feb. 28, 2003), <http://www.wilderness.org/WhereWeWork/NewMexico/WR88-OteroMesa.cfm>.

<sup>223</sup> *Utah v. Norton*, No. 03-4147 (10th Cir. 2004). See *supra* note 207 and accompanying text for a description of the Utah settlement. Meanwhile, existing wilderness study areas remain vulnerable to degradation. See *Norton v. S. Utah Wilderness Alliance*, 124 S. Ct. 2373 (2004) (holding that BLM could not be compelled to restrict off-road vehicle use in wilderness study areas).

### *C. The Continuing Relevance of Wilderness*

Can it be that the Wilderness Act has become a worn-out anachronism—"an albatross around the neck of contemporary conservationists"—that contravenes both biodiversity objectives and sustainable development?<sup>224</sup> The Act's failure to prioritize appropriate biodiversity goals is detailed above.<sup>225</sup> According to Professors Coggins and Glicksman, the wilderness preservation process "as originally conceived and subsequently implemented has not been sufficiently systematic to promote fully the statutory goal of 'secur[ing] for the American people of present and future generations the benefits of an enduring resource of wilderness.'"<sup>226</sup>

Criticisms notwithstanding, the existing wilderness system does support essential ecological features. The fact that existing wilderness areas have been protected from roads and the human influences that come with roads makes them extremely valuable from a biodiversity standpoint.<sup>227</sup> Wilderness areas represent many of the largest unroaded preserves in the nation, and roadlessness is key to the system's ecological integrity.<sup>228</sup>

The need for large preserves is one of the few generally accepted principles of conservation biology.<sup>229</sup> The preservation of control areas large enough to encompass landscape-level processes and to persist or adapt with natural disturbances is critical because the effects of land management are often expressed at a landscape scale.<sup>230</sup> Even wilderness areas that are not

<sup>224</sup> Waller, *supra* note 10, at 540.

<sup>225</sup> See *supra* Part IV.A.

<sup>226</sup> Glicksman & Coggins, *supra* note 17, at 392 (citing 16 U.S.C. § 1131(a) (2000)). Professors Glicksman and Coggins note the following:

[S]o far as we can tell, little thought has been devoted to the National Wilderness Preservation System *as a system*, in the same way, for example, as the National Park System is designed to function as an integrated whole. Certainly, the management of official wilderness areas by four separate agencies—each with its own traditions, missions, and governing standards—has no pretense of uniformity or even of coordination.

*Id.* at 393 (emphasis added).

<sup>227</sup> See *supra* Part II.A for a discussion of the values of unroaded areas.

<sup>228</sup> Noss, *supra* note 4, at 523. Noss and other ecologists claim that, for certain ecosystems, an area of one million hectares (approximately 2.5 million acres) is necessary to maintain natural function, disturbance regimes and viable populations of large mammals. *Id.* at 529. See U.S. GEOLOGICAL SURVEY, OPEN-FILE REPORT NO. 94-532, U.S. GEOLOGICAL SURVEY SUBSIDENCE INTEREST GROUP CONFERENCE: ABSTRACT AND SUMMARY, at v (1995), <http://water.usgs.gov/pubs/of/1994/ofr94-532/pdf/OFR94-532.pdf> (noting that one hectare is the equivalent of 2.47 acres). Only eight wilderness areas exceed 2.5 million acres in size; six of these are located in Alaska. See WILDERNESS.NET, NATIONAL WILDERNESS PRESERVATION SYSTEM: ALASKA, at [http://www.wilderness.net/index.cfm?fuse=NWPS&sec=stateView&state=ak\\_c](http://www.wilderness.net/index.cfm?fuse=NWPS&sec=stateView&state=ak_c) (last visited Nov. 14, 2004). Only nineteen wilderness areas exceed one million acres, fourteen of which are in Alaska. *Id.* Conversely, about one-third of them are less than 10,000 acres, which is about four miles across—"an easy stroll." Turner, *supra* note 18, at 619.

<sup>229</sup> See Waller, *supra* note 10, at 554 (stating that "allocating large blocks of suitable habitat . . . [is] a first defense against further species losses").

<sup>230</sup> Noss, *supra* note 10, at 409. Landscape processes of concern include distance propagation and fluxes of organisms and materials between communities. *Id.* "Only large areas

completely “pristine” provide a valuable benchmark: “a dynamic and imperfect baseline is better than no baseline at all; the larger the control area, the less it will be affected by many cross-boundary phenomena.”<sup>231</sup> Preserving fragmented, small areas, even biodiversity “hot spots,” may over time produce “depauperate ‘museum pieces’ . . . not viable ecosystems.”<sup>232</sup>

Although his initial justification was purely anthropocentric, by 1941, Aldo Leopold had changed his tune, concluding that there was a compelling scientific rationale for wilderness protection after all: “wilderness areas . . . have a large value to land-science [as a] base-datum of normality, a picture of how healthy land maintains itself.”<sup>233</sup> Admittedly, the wilderness network, viewed as one piece of a sustainable conservation policy, encompasses a broad set of values that extend well beyond ecology, but the mix of values will ultimately increase rather than diminish the importance of wilderness in future debates. The creation and expansion of the wilderness system has played a significant role in the “remarkable reformation” toward preservation of wild places and wildlife on the public lands.<sup>234</sup> The official expression of a wild land preservation policy in the Act has, over time, influenced the public’s perception of the public lands and generated demand for the preservation of more wild lands, be they “capital W” official wilderness areas or other types of preserves. The wilderness movement may ultimately prove itself the spark that tempers the quest for resource development with the principles of biodiversity. Even J. Baird Callicott, a well-known wilderness skeptic, eventually concluded that, even if the idea of wilderness is flawed, “there’s nothing whatever wrong with the *places* we call wilderness, except that they are too small, too few and far between, and . . . mostly misallocated.”<sup>235</sup>

Why are wilderness areas too small, too few and mostly misallocated? While it has provided national recognition and protection to millions of acres of land through the Wilderness Act, Congress is not necessarily the most effective decision making body for preserving wild lands and biodiversity. In many cases, congressional designation of official wilderness cannot happen quickly enough to prevent imminent harm from development pressures. Moreover, in the wilderness context, local development interests are often elevated over national interests, and are frequently able to block wilderness designation. As a result, precious few significant wilderness areas have been added in recent years, even though the general public favors the preservation of more public lands.<sup>236</sup>

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support larger, more viable, and interconnected populations of rare and threatened species and perpetuate the ecological process that sustain other elements of biodiversity.” Waller, *supra* note 10, at 554.

<sup>231</sup> Noss, *supra* note 10, at 409.

<sup>232</sup> Noss, *supra* note 4, at 530 (citation omitted)

<sup>233</sup> Grumbine, *supra* note 51, at 602–03.

<sup>234</sup> Waller, *supra* note 10, at 542.

<sup>235</sup> Callicott & Nelson, *supra* note 1, at 587 (emphasis in original). See *supra* notes 155, 228, and accompanying text for data on the size of wilderness areas.

<sup>236</sup> Albert C. Lin, *Clinton’s National Monuments: A Democrat’s Undemocratic Acts?*, 29 *ECOLOGY L.Q.* 707, 737–38 (2002); see Jenkins, *supra* note 185, at 8, 10 (noting public’s support

Placing sole reliance on the hodgepodge of lands included in the existing wilderness system is not the best means of preserving the values of wildness on our public lands. Yet the system has already matured, and it may be too late to infuse it with the most desirable characteristics. It is not too late, however, to manage existing areas to accentuate their biodiversity, and to add new wilderness areas and other types of federal preserves that represent important ecosystems and habitat.

#### V. PRESERVING WILD LANDS THROUGH EXECUTIVE BRANCH INITIATIVES

*"[The Antiquities Act] has given our nation and its people a conservation legacy that is the envy of other nations."*<sup>237</sup>

Long before the enactment of the Wilderness Act, the executive branch played a critical role in preserving public lands and resources from exploitation by designating oil reserves, wildlife reserves, forest reserves, and national monuments. Depending on one's perspective, the Clinton Administration takes either the blame or the glory for a being a leader in terms of acres preserved via executive action. It acted in two ways, by designating national monuments, largely on BLM lands, through executive order, and by setting aside millions of acres of roadless areas in the National Forests through rulemaking. Although together these initiatives are more sweeping than any previous executive branch preservation agenda, each was built upon a solid base of statutory and regulatory authority for managing the public lands.<sup>238</sup> Arguably, these initiatives simply reflect the reality of the new West: The economic and cultural benefits of biodiversity and recreation far exceed that of other uses.<sup>239</sup> Both approaches, however, raise compelling issues about executive power and about the future of our nation's public lands.

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for wilderness, but describing a decline in congressional wilderness designations since 1994). Bills to expand the wilderness system are proposed every session, but fewer and fewer of them have been passed in recent years. See GORTE, *supra* note 10, at 4; Jenkins, *supra* note 185, at 10. For a discussion of the procedural shortcomings of Wilderness Act designation processes, see *infra* Part VI.A.

<sup>237</sup> Mark Squillace, *The Monumental Legacy of the Antiquities Act of 1907*, 37 GA. L. REV. 473, 582–83 (2003).

<sup>238</sup> President Clinton's roadless directive and his national landscape monuments initiative formed a remarkable, multi-pronged conservation initiative, the likes of which have not been seen since Teddy Roosevelt was in office. *Id.* at 504–08.

<sup>239</sup> See *supra* notes 56–63 and accompanying text. It is difficult, if not impossible, to assess the total value of the full range of services provided by functioning ecosystems and biodiversity, but in all likelihood it far exceeds recreational and commodity-based benefits of public lands combined. See James Salzman, *Valuing Ecosystem Services*, 24 ECOLOGY L.Q. 887 (1997); James Salzman et al., *Protecting Ecosystem Services: Science, Economics, and Law*, 20 STAN. ENVTL. L.J. 309 (2001).

### A. Presidential Preservation

Presidents have long used executive orders to manage internal governmental affairs and provide guidance to their underlings on a broad range of subjects, including land preservation.<sup>240</sup> In some cases, the President took action to preserve public lands without explicit authorization, while in others the President acted pursuant to congressional directives.<sup>241</sup> Congress has validated the practice of executive withdrawal or reservation of public lands through a variety of enactments going as far back as the early 1800s.<sup>242</sup> The 1891 Forest Reserve Act<sup>243</sup> authorized the President to withdraw forested lands from the public domain and reserve them for timber and watershed purposes.<sup>244</sup> The reservation of land for military forts and Indian trading posts was expressly authorized by various statutes enacted in the nineteenth century.<sup>245</sup> The Pickett Act<sup>246</sup> gave the President authority to withdraw public lands on a temporary basis, to “remain in force until revoked by him or an Act of Congress.”<sup>247</sup> The Reclamation Act<sup>248</sup> and the Stock-Raising Homestead Act<sup>249</sup> provided the executive branch with discretion to reserve public lands for specific purposes delineated by Congress.

The most resilient of these enactments is the Antiquities Act of 1906,<sup>250</sup> which provides the President with the power, “in his discretion, to declare . . . historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest . . . to be national monuments.”<sup>251</sup> Such declarations are to encompass “parcels of land, the limits of which in

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<sup>240</sup> Tara L. Branum, *President or King? The Use and Abuse of Executive Orders in Modern Day America*, 28 J. LEGIS. 1 (2002).

<sup>241</sup> Marla E. Mansfield, *A Primer of Public Land Law*, 68 WASH. L. REV. 801, 823 (1993). Two of the most celebrated presidential preserves created without explicit authorization were Teddy Roosevelt's creation of Pelican Island Wildlife Refuge in 1903 and President Taft's 1909 withdrawal of over three million acres to prevent oil-rich public lands from passing into private ownership. *See id.*; *United States v. Midwest Oil Co.*, 236 U.S. 459, 461–62 (1915).

<sup>242</sup> *Grisar v. McDowell*, 73 U.S. 363, 381 (1867); *see* 1 CHARLES F. WHEATLEY ET AL., *STUDY OF WITHDRAWALS AND RESERVATIONS OF PUBLIC DOMAIN LANDS* 55–62 (citing statutes from 1789–1890). A withdrawal is a measure that precludes homesteading, mining or other disposition of the public lands, while a reservation dedicates the land to a particular purpose. 2 *id.* app. at A1–A2; 43 U.S.C. § 1702(j) (2000).

<sup>243</sup> Act of March 3, 1891, ch. 461, 51st Cong., 26 Stat. 1095.

<sup>244</sup> *Id.* § 24, 26 Stat. at 1103. *See supra* Part III.A for a discussion of presidential authority to reserve forests under the Property Clause.

<sup>245</sup> *See* 1 WHEATLEY ET AL., *supra* note 242, at 57–59 (citing statutes).

<sup>246</sup> Act of June 25, 1910, 36 Stat. 847 (repealed 1976).

<sup>247</sup> *Id.*

<sup>248</sup> 43 U.S.C. § 416 (2000) (authorizing the withdrawal of lands for the construction and maintenance of irrigation works), *amended by* FLPMA, Pub. L. No. 94-579, 90 Stat. 2792, § 704(a) (1976).

<sup>249</sup> 43 U.S.C. § 300 (2000) (authorizing the withdrawal of water holes and springs), *repealed by* FLPMA, Pub. L. No. 94-579, 90 Stat. 2792, § 704(a) (1976).

<sup>250</sup> 16 U.S.C. § 431 (2000).

<sup>251</sup> *Id.*

all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected."<sup>252</sup>

### *1. Implementation of the Antiquities Act*

Over the years, vast areas of land have been withdrawn under the Antiquities Act to create 123 national monuments of various sizes and of ecosystem types, totaling nearly 70 million acres of land.<sup>253</sup> The National Park Service manages the majority of these monuments, while the BLM has responsibility for 15 and the Forest Service manages four of them.<sup>254</sup>

Presidents from both dominant political parties have exercised their Antiquities Act powers aggressively since the Act's inception. Republican President Theodore Roosevelt forged the way by designating Devils Tower as the nation's first national monument.<sup>255</sup> Roosevelt also designated one of the largest, the Grand Canyon National Monument, and dozens of others for a total of 1.5 million acres.<sup>256</sup> Democratic President Jimmy Carter holds the record on total acres (56 million) with his designation of 17 Alaskan monuments.<sup>257</sup> President Bill Clinton, also a Democrat, places second, with 19 new monuments over the course of his tenure totaling approximately five million acres.<sup>258</sup> Democratic President Franklin Roosevelt and staunchly conservative Republican President Calvin Coolidge each totaled around 2.6 million acres, creating 28 and 15 national monuments respectively.<sup>259</sup> The only presidents who have not utilized the Antiquities Act power are Richard Nixon, Ronald Reagan and both George H.W. and George W. Bush.

The use of Antiquities Act power for broad ecological goals is not a recent phenomenon. Several of Theodore Roosevelt's national monuments envelop entire landscapes, including the Grand Canyon and Mount Olympus, which support a rich diversity of species and habitat.<sup>260</sup> Others protect

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<sup>252</sup> *Id.*

<sup>253</sup> Eric C. Rusnak, *The Straw that Broke the Camel's Back? Grand Staircase-Escalante National Monument Antiquates the Antiquities Act*, 64 OHIO ST. L.J. 669, 672 (2003); THE WILDERNESS SOC'Y, THE ANTIQUITIES ACT: PROTECTING AMERICA'S NATURAL TREASURES, at <http://www.wilderness.org/Library/Documents/loader.cfm?url=/commonspot/security/getfile.cfm&PageID=2894> (last visited Nov. 14, 2004).

<sup>254</sup> See BUREAU OF LAND MANAGEMENT, NATIONAL MONUMENTS, at <http://www.blm.gov/nlcs/monuments/index.html> (last visited Nov. 14, 2004) (describing the 15 national monuments (comprising 3.9 million acres) under its jurisdiction); NAT'L FOREST SERV., MONUMENTS STATE BY STATE, at <http://www.fs.fed.us/land/staff/lar/LAR01/table18.htm> (last visited Nov. 14, 2004) (showing four national monuments covering 3.7 million acres of land managed by the Forest Service).

<sup>255</sup> 34 Stat. 3236 (1906) (creating Devils Tower National Monument).

<sup>256</sup> 35 Stat. 2175 (1908) (creating Grand Canyon National Monument). See Squillace, *supra* note 237, at app. (providing a chronological list of monuments).

<sup>257</sup> President Carter declared 17 Alaskan monuments on the same day (December 1, 1978). Squillace, *supra* note 237, at 504. This includes the largest monument, Wrangell-St. Elias, at 11 million acres, which was subsequently designated by Congress as a National Park Preserve. *Id.* at 502 n.181.

<sup>258</sup> 146 CONG. REC. S7030-31 (daily ed. July 17, 2000) (statement of Sen. Nickles).

<sup>259</sup> *Id.*

<sup>260</sup> See Rusnak, *supra* note 253, at 682; Squillace, *supra* note 237, at 492-93.

smaller areas of ecological or biological interest, such as Muir Woods and Devil's Hole.<sup>261</sup>

A number of the most recently designated BLM and National Forest Monuments were selected specifically for their wildness and their rich biological diversity. The 53,000 acre Cascade-Siskiyou National Monument is an "ecological crossroads," where three distinct bioregions intersect and at least 23 rare plants grow.<sup>262</sup> It includes the Soda Mountain Wilderness Study Area, along with four Areas of Critical Environmental Concern (including two Research Natural Areas) and portions of a Late Successional Reserve designated by the President's Forest Plan for the Pacific Northwest.<sup>263</sup> Similarly, the 486,000 acre Sonoran Desert National Monument provides "a magnificent example of untrammelled Sonoran desert landscape. The area encompasses a functioning desert ecosystem with an extraordinary array of biological, scientific, and historic resources . . . includ[ing] a *spectacular diversity* of plant and animal species."<sup>264</sup> The Sonoran Monument encompasses three congressionally designated wilderness areas.<sup>265</sup> The 328,000 acre Giant Sequoia National Monument includes a "rich and varied landscape" of "[m]agnificent groves of towering giant sequoias, . . . interspersed within a great belt of coniferous forest, jeweled with mountain meadows."<sup>266</sup> It encompasses two wilderness areas and several other congressionally designated areas.<sup>267</sup>

Congressional impasse over wild lands eligible for wilderness designation has been broken, in some cases, by identification of the area as a monument.<sup>268</sup> Prior to President Clinton's designation of Grand Staircase-

<sup>261</sup> See Proclamation No. 2961, 17 Fed. Reg. 691 (Jan. 23, 1952) (designating Devil's Hole, a 40-acre parcel added to Death Valley National Monument, for its "unusual features of scenic, scientific, and educational interest," including a "peculiar race of desert fish" and a remarkable subterranean pool); Proclamation No. 793, 35 Stat. 2174 (1908) (designating 295 acres of the last old growth coast redwood forest in the San Francisco Bay Area as Muir Woods National Monument).

<sup>262</sup> Proclamation No. 7318, 65 Fed. Reg. 37,249 (June 13, 2000).

<sup>263</sup> *Id.* See *supra* Part IV.B.1 for a discussion of ACECs, RNAs, and Late Successional Reserves.

<sup>264</sup> Proclamation No. 7397, 66 Fed. Reg. 7354 (Jan. 22, 2001) (emphasis added).

<sup>265</sup> U.S. DEP'T OF THE INTERIOR, BUREAU OF LAND MANAGEMENT, SONORAN DESERT NATIONAL MONUMENT FACT SHEET, at <http://www.az.blm.gov/sonoran/sondesfctsht1.htm> (last visited Nov. 14, 2004).

<sup>266</sup> Proclamation No. 7295, 65 Fed. Reg. 24,095 (Apr. 15, 2000). The proclamation adds that, "[t]he great elevational range of the monument embraces a number of climatic zones, providing habitats for an extraordinary diversity of plant species and communities," and that ancient "sequoias and their surrounding ecosystems provide a context for understanding ongoing environmental changes" and "an excellent opportunity to understand the consequences of different approaches to forest restoration." *Id.* at 24,095.

<sup>267</sup> See U.S. DEP'T OF AGRIC., FOREST SERVICE, GIANT SEQUOIA NATIONAL MONUMENT MANAGEMENT PLAN FEIS 3 Fig. I-1 (2003) [hereinafter GIANT SEQUOIA FEIS], <http://www.fs.fed.us/r5/sequoia/gsnm/feis/chap1/chap1.htm> (monument map); *id.* at Summary, <http://www.fs.fed.us/r5/sequoia/gsnm/feis/summary/summary.html> (noting that the monument includes portions of the Monarch Wilderness and the Golden Trout Wilderness, as well as Kings Wild and Scenic River, North Fork Kern Wild and Scenic River, and Kings River Special Management Area).

<sup>268</sup> See John D. Leshy, *Shaping The Modern West: The Role of the Executive Branch*, 72 U.



Escalante National Monument in 1996, nearly half of the acreage within present monument boundaries were classified as Wilderness Study Areas (WSAs) pursuant to the Wilderness Act and FLPMA.<sup>269</sup> However, after years of debate, Congress had failed to protect the area with a formal wilderness designation. President Clinton's proclamation was, in part, motivated by this stalemate and was designed to accomplish much of the protection which could have been secured by a wilderness designation.<sup>270</sup>

In Oregon, Secretary Babbitt's announcement that Steens Mountain was being considered for monument status ultimately led to the enactment of a legislative package that includes 170,000 acres of wilderness within a 426,000 acre cooperative management area.<sup>271</sup> The legislation, which resulted from negotiations between environmentalists, landowners, and the Department of the Interior, is far from a typical wilderness bill.<sup>272</sup> Although grazing is eliminated on about 97,000 acres of wilderness, in exchange, local ranchers received access to an additional 100,000 acres of arid federal land.<sup>273</sup> Certain lands within the area were released from wilderness study while others were retained as WSAs.<sup>274</sup> All federal lands within the area are

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COLO. L. REV. 287, 305–06 (stating that the designation of the Grand Staircase-Escalante National Monument was preceded by years of public debate about the area's management and preservation); James R. Rasband, *Utah's Grand Staircase: The Right Path to Wilderness Preservation?*, 70 U. COLO. L. REV. 483, 492–98 (1999) (describing the Grand Staircase-Escalante National Monument, designated in reaction to decades-long congressional impasse over wilderness designation in Utah); David H. Getches, *Managing the Public Lands: The Authority of the Executive to Withdraw Lands*, 22 NAT. RESOURCES J. 279, 304–05 (1982) (discussing executive designation of Jackson Hole National Monument in reaction to eighteen-year congressional impasse).

<sup>269</sup> See Rasband, *supra* note 268, at 492; Rusnak, *supra* note 253, at 694.

<sup>270</sup> See *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1184 (D. Utah 2004) (noting arguments, based on Interior and Council on Environmental Quality documents, that the President was motivated by wilderness failures).

<sup>271</sup> See Steens Mountain Cooperative Management and Protection Act of 2000, Pub. L. No. 106-399, title II, § 201 (codified at 16 U.S.C. § 460nnn (2000)) (establishing a total management area of 496,000 acres on BLM lands, with portions designated as wilderness, Wild and Scenic River designations, a Cooperative Management Area, a "no grazing" area, a Trout Reserve, a Mineral Withdrawal Area and a Wildland Juniper Area); U.S. BUREAU OF LAND MANAGEMENT, STEENS MOUNTAIN FACTS: LEGISLATIVE SUMMARY OF THE STEENS MOUNTAIN COOPERATIVE MANAGEMENT AND PROTECTION ACT OF 2000, at

[http://www.or.blm.gov/steens/facts/facts\\_page.htm](http://www.or.blm.gov/steens/facts/facts_page.htm) (last visited Nov. 14, 2003) (providing details about the area). A participant in the negotiations that led to the Steens Mountain legislation observed, "We didn't want it classified as a national monument because that immediately shows up on your Rand McNally travel map and everybody comes to see the monument. We wanted a name that was unattractive for the average person." Steven C. Forrest, *Creating New Opportunities for Ecosystem Restoration on Public Lands: An Analysis of the Potential for Bureau of Land Management Lands*, 23 PUB. LAND & RESOURCES L. REV. 21, 59 (2002).

<sup>272</sup> James R. Rasband, *The Future of the Antiquities Act*, 21 J. LAND RESOURCES & ENVTL. L. 619, 622 (2001).

<sup>273</sup> 16 U.S.C. § 460nnn-62(d)(2) (2000); see also Forrest, *supra* note 271, at 60. Private landowners traded 18,000 acres of high elevation land, and approximately \$5 million changed hands, with \$25 million reserved for future land acquisition. *Id.* (citing Patricia Filip, *The Struggle for Steens Mountain*, OREGON STATER, April 2001, at 23, 26).

<sup>274</sup> 16 U.S.C. §§ 460nnn-64, 460nnn-91 (2000).

to be managed by BLM, but the newly formed Steens Mountain Advisory Council will advise the agency on management of the cooperative area.<sup>275</sup>

The outlook for the San Rafael Swell area of Utah is not as bright. Wilderness proposals for the area prompted then-Governor Mike Leavitt to ask President Bush to create a 600,000 acre national monument in 2002.<sup>276</sup> The use of all-terrain vehicles is affecting the fragile soils of the Swell, which is comprised of a band of sandstone cliffs that rise from the desert floor like reefs in an ocean, and diminishing habitat for wild horses and bighorn sheep.<sup>277</sup> Members of Congress had sought protection for the area in the past, to no avail.<sup>278</sup> When a county referendum came out against designation, Leavitt withdrew his support and, rather than repeat President Clinton's performance in Utah, the Bush Administration dropped its interest in conserving the area.<sup>279</sup> Without local or presidential support, the wild lands of the Swell remain vulnerable to degradation.

## 2. *The Efficacy and Durability of National Monument Declarations*

The use of the Antiquities Act to declare federal lands as national monuments has been extraordinarily successful in serving biodiversity needs. Beginning as early as 1908, remarkable natural features and even entire ecosystems have been protected through the Act.<sup>280</sup> The designation of national monuments promotes sustainable development objectives much like zoning decisions might: By limiting development to appropriate places, it takes pressure off sensitive resources and areas more valuable for their undeveloped attributes.

National monuments have also proven to be extremely durable. Executive orders in general are more ephemeral than statutes or regulations, and can be wiped off the slates as soon as the next administration takes over. Yet it rarely happens, particularly when it comes to popular preservation-oriented action like monument declarations. Nationally, monuments are extremely popular with the public, and the political costs of rescinding them are high enough to discourage rash executive behavior in many if not most cases. Further, a string of legal opinions has concluded that the Antiquities Act power is a limited power to *declare*, and does not include the distinctive power to *undo*, national monuments.<sup>281</sup> In spite of the heated

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<sup>275</sup> See Forrest, *supra* note 271, at 60.

<sup>276</sup> See Rusnak, *supra* note 253, at 717; Eric Pianin, *Bush May Create Monument in Southern Utah*, WASH. POST, Jan. 30, 2002, at A2.

<sup>277</sup> Pianin, *supra* note 276, at A2.

<sup>278</sup> See Rusnak, *supra* note 253, at 717–18. Utah Representative Chris Cannon sponsored a bill to create a national conservation area in the San Rafael area in 1998, but his efforts were unsuccessful. A similar House bill was debated in 2000 but failed in part because Utah Representatives (including Cannon) refused to agree to provisions prohibiting all-terrain vehicles. *Id.*

<sup>279</sup> *On the Environment*, SALT LAKE TRIB., Aug. 12, 2003, at A13.

<sup>280</sup> See *supra* notes 260–267 and accompanying text (describing Mount Olympus, the Sonoran Desert, and other bio-diverse monuments).

<sup>281</sup> See Squillace, *supra* note 237, at 552–54; Christine Klein, *Preserving Monumental Landscapes under the Antiquities Act*, 87 CORNELL L. REV. 1333, 1388–89 (2002).

rhetoric employed by opponents of Clinton's monument designations, Interior Secretary Norton announced that the Bush Administration would not attempt to overturn any of the new monuments.<sup>282</sup>

The presidential designation of national monuments has been virtually bulletproof from the standpoint of judicial review as well. From the outset, the courts have uniformly rejected challenges to monument designations. In *United States v. Cameron*,<sup>283</sup> the United States brought an action to eject Ralph Cameron from a mining claim on the southern rim of the Grand Canyon. Cameron, in his defense, challenged the Grand Canyon's designation, claiming that the area was not an object of historic or scientific interest.<sup>284</sup> A unanimous Supreme Court rejected the argument in one short paragraph, and accepted the presidential findings that the canyon is "an object of unusual scientific interest" as the "greatest eroded canyon in the United States, if not in the world . . . [which] affords an unexampled field for geologic study, [and] is regarded as one of the great natural wonders."<sup>285</sup> Cameron also alleged that the reservation was not the smallest area compatible with its proper care and management.<sup>286</sup> The Court did not resolve the issue, but the opinion demonstrates its willingness to defer to the President's judgment regarding monument designations.<sup>287</sup>

The Supreme Court reaffirmed the determination that natural features are proper subjects of a monument declaration in *Cappaert v. United States*.<sup>288</sup> There, the Court found that a reserved federal water right existed to support an underground pool and its inhabitants, a rare species of desert fish known as the Devil's Hole pupfish (*Cyprinodon diabolis*), at Devil's Hole National Monument.<sup>289</sup> Devil's Hole was reserved "for the preservation of the unusual features of scenic, scientific, and educational interest," in particular, the protection of the "peculiar race of desert fish . . . which is found nowhere else in the world" and the pool itself, which "is of . . . outstanding scientific importance."<sup>290</sup> The Court concluded that the water level of the pool could

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<sup>282</sup> See Eric Pianin, *White House Won't Fight Monument Designations*, WASH. POST, Feb. 21, 2001, at A7.

<sup>283</sup> 252 U.S. 450 (1920).

<sup>284</sup> *Id.* at 454. Cameron argued that the President had set aside the enormous canyon simply because of its size, which, in and of itself, did not qualify the area as an object of unusual scientific interest under the Act. *Id.* at 455-56.

<sup>285</sup> *Id.* at 455-56.

<sup>286</sup> *Id.*; see also Getches, *supra* note 268, at 303 n.131 (describing Cameron's arguments). The legislative history provides support for Cameron's argument. The floor manager in the House, Representative Lacey, assured his colleagues that, unlike the forest reserves, "[n]ot very much land" would be taken off the market as a result of the Antiquities Act, because it would involve only the "smallest area necesstry [sic] for the care and maintenance of . . . old objects of special interest and the Indian remains in the pueblos of the Southwest." See *id.*, at 302 nn.124-27 (citing 40 CONG. REC. 7888 (1906)); see also H.R. REP. NO. 59-2224 (1905) ("The bill proposes to create small reservations reserving only so much land as may be absolutely necessary for the preservation of these interesting relics of prehistoric times.").

<sup>287</sup> See *Cameron*, 252 U.S. at 456.

<sup>288</sup> 426 U.S. 128 (1976).

<sup>289</sup> *Id.* at 141.

<sup>290</sup> *Id.*, citing Proclamation No. 2961, 3 C.F.R. 147 (1949-1953 (Jan. 17, 1952)).

only be diminished if there were no impairment to the pool's value as habitat for the pupfish.<sup>291</sup>

Likewise, the designation of Grand Teton National Monument was upheld in *Wyoming v. Franke*.<sup>292</sup> The proclamation addressed the statutory criteria in the most cursory manner: "[T]he Jackson Hole country... contains historic landmarks and other objects of historic and scientific interest."<sup>293</sup> After allowing the United States to submit evidence of the area's characteristics, the court concluded that the declaration satisfied the minimal standards of the Antiquities Act.<sup>294</sup> Although it believed that it could result in hardship to the state of Wyoming,<sup>295</sup> the court concluded that separation of powers necessitated deference: "For the judiciary to probe the reasoning which underlies this Proclamation would amount to a clear invasion of the legislative and executive domains."<sup>296</sup>

Given the charged political context of executive withdrawals, it is not surprising that courts are loath to second-guess a presidential determination that lands within monument boundaries possess some historic or scientific interest.<sup>297</sup> Although the *Franke* court suggested that "a bare stretch of sagebrush prairie . . . would undoubtedly be outside the [Act's] scope and purpose,"<sup>298</sup> no court has thus far invalidated a national monument, and it appears that no court will seriously question a monument declaration on these or any other grounds.

All challenges to President Clinton's declarations have been resoundingly rejected. Plaintiffs brought claims in several circuits, arguing

<sup>291</sup> *Cappaert*, 426 U.S. at 141–42. Similarly, in an unpublished case involving a challenge to President Carter's Alaska monuments, the district court agreed that "matters of scientific interest which involve geological formations or which may involve plant, animal or fish life are within this reach of the presidential authority under the Antiquities Act." *Anaconda Copper Co. v. Andrus*, 14 Env't Rep. (BNA) 1853, 1854 (D. Alaska 1980). The court explicitly noted that the statutory authority is not limited to historic structures or landmarks, "but is much enlarged by the extent of authority to declare by . . . Proclamation public monuments for other objects of historic or scientific interest." *Id.*

<sup>292</sup> 58 F. Supp. 890 (D. Wyo. 1945).

<sup>293</sup> *Id.* at 894 (citing Proclamation No. 2578, *reprinted in* 57 Stat. 731 (Mar. 17, 1943)).

<sup>294</sup> *Franke*, 58 F. Supp. at 896. The area consisted of nearly 222,000 acres of public land, some of which had been donated for park purposes by John D. Rockefeller, Jr. *See* Proclamation No. 2578, *reprinted in* 57 Stat. 531 (Mar. 17, 1943). The evidence showed that the area included mineral deposits, important indigenous plants, glacial formations and historic trails, and camps. *Franke*, 58 F. Supp. at 895.

<sup>295</sup> *Franke*, 58 F. Supp. at 897.

<sup>296</sup> *Id.* at 896 (citing *United States v. George S. Bush & Co.*, 310 U.S. 371, 380 (1940)).

<sup>297</sup> *See id.* Courts tend to exhibit reluctance to mediate political controversies between the legislative and the executive branches. *See Dalton v. Specter*, 511 U.S. 462, 476 (1994) (noting the President's exercise of discretionary powers granted by Congress "is not a matter for our review"); *George S. Bush & Co.*, 310 U.S. at 380 (noting that the exercise of presidential discretion does not raise any reviewable question of law); *Dakota Cent. Tel. Co. v. South Dakota*, 250 U.S. 163, 184 (1919) (noting that a claim concerning "mere excess or abuse" of presidential discretion over powers granted by Congress "involves considerations which are beyond the reach of judicial power"). *Cf. Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992) (noting that, given unique constitutional position of the President, congressional silence is not enough to subject his decisions to review).

<sup>298</sup> *Franke*, 58 F. Supp. at 895.

both that the declarations failed to properly identify scientific or historic objects with specificity and that they violated an array of constitutional and statutory provisions.<sup>299</sup> In *Tulare County v. Bush*, the D.C. Circuit Court of Appeals held that President Clinton had identified “objects of historic and scientific interest” with sufficient particularity in establishing the Giant Sequoia National Monument by describing the ancient trees, geological features such as limestone caverns, paleontological resources, and archaeological sites.<sup>300</sup> Similarly, in *Mountain States Legal Foundation v. Bush*, the same court found no infirmities in the Grand Staircase–Escalante, Ironwood Forest, and several other National Monument Proclamations:

Each Proclamation identifies particular objects or sites of historic or scientific interest and recites grounds for the designation that comport with the Act’s policies and requirements. For example, Proclamation 7320 . . . states that the Ironwood Forest National Monument “holds abundant rock art sites and other archeological objects of scientific interest.” . . . To warrant further review of the President’s actions, Mountain States would have to allege facts to support the claim that the President acted beyond his authority under the Antiquities Act. Having failed to do this, Mountain States presents the court with no occasion to decide the ultimate question of the availability or scope of review for exceeding statutory authority.<sup>301</sup>

The court went on to find that the declarations did not pose a constitutional nondelegation problem as the President had lawfully exercised powers provided by the Antiquities Act, which provides “intelligible principles to guide the President’s actions.”<sup>302</sup>

Looking beyond the Antiquities Act, the D.C. Circuit dismissed a variety of claims that the declarations violated other statutes. Mountain States had argued that the Wilderness Act is the “sole means” by which the federal government may withdraw land from public use to protect scenic beauty, natural wonders, or wilderness values.<sup>303</sup> The court concluded that protective monument designations for wild lands are not precluded by the Wilderness Act, and that any potential overlap between the statutes was

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<sup>299</sup> See, e.g., *Tulare County v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002), *rehearing en banc denied* (2003), *cert. denied*, 124 S. Ct. 63 (2003); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002), *rehearing en banc denied* (2003), *cert. denied*, 124 S.Ct. 61 (2003); *Utah Ass’n of Counties v. Bush*, 316 F. Supp. 2d 1172 (D. Utah 2004).

<sup>300</sup> *Tulare County*, 306 F.3d at 1141. The court also dismissed arguments that the executive order resulted in an improper reorganization of government as not ripe.

<sup>301</sup> *Mountain States Legal Found.*, 306 F.3d at 1137 (citations omitted). The District of Utah has also upheld the Grand Staircase–Escalante proclamation in *Utah Ass’n of Counties*, 316 F. Supp. 2d 1172 (D. Utah 2004).

<sup>302</sup> *Mountain States Legal Found.*, 306 F.3d at 1137; see *Utah Ass’n of Counties*, 316 F. Supp. 2d at 1186 (rejecting a nondelegation challenge to the Grand Staircase–Escalante proclamation); Zellmer, *supra* note 80, at 1037–48 (discussing the nondelegation doctrine as applied to the Antiquities Act).

<sup>303</sup> *Mountain States Legal Found.*, 306 F.3d at 1138. Along the same lines, Mountain States asserted that the Endangered Species Act of 1973, 16 U.S.C. §§ 1532–1544 (2000), is the “sole means” for protecting species and their habitat. *Mountain States Legal Found.*, 306 F.3d at 1138.

unremarkable,<sup>304</sup> given the existing array of multipurpose statutes such as MUSYA, FLPMA, NFMA, the National Park Service Organic Act,<sup>305</sup> and the National Wildlife Refuge System Administration Act.<sup>306</sup> Each of these statutes, the court stated, protect scenic and wilderness values, and efforts to preserve federal lands legitimately advance the purposes of all of them.<sup>307</sup> The Antiquities Act simply provides an alternative means to withdraw federal public lands from destructive activities, one which is effectuated by the President rather than Congress or administrative agencies. “Consequently, Mountain States’ contention that the Antiquities Act must be narrowly construed . . . again misses the mark.”<sup>308</sup>

The challengers’ overarching concern appears to be that MUSY principles are somehow offended by monument designations on BLM and Forest Service land. Prior to the Clinton proclamations, most monuments were placed under the jurisdiction of the National Park Service, which is, pursuant to the National Park Service Organic Act, a more restrictive delegation.<sup>309</sup> BLM and the Forest Service manage the monuments under their care pursuant to FLPMA, NFMA, and the executive orders that created the monuments.<sup>310</sup> BLM’s multiple-use mandate, expressed in FLPMA, recognizes environmental and cultural values and preservation of certain lands “in their natural condition” on par with minerals, timber, and forage resources.<sup>311</sup> Likewise, the Forest Service operates according to multiple-use principles expressed in NFMA, which explicitly include wildlife and wilderness values, along with timber and range.<sup>312</sup> Monument status protects the land from destructive or degrading activities, but the only multiple-use activities that are prohibited as a result of monument designation are those that are incompatible with the “proper care and management of the objects to be protected.”<sup>313</sup> This edict is by no means inconsistent with the MUSY concept contained in FLPMA and NFMA.

The Antiquities Act has also proven its durability in the legislative arena. Congressional members have attempted to rescind or curtail this power over the years, with minimal success.<sup>314</sup> The only true inroad on

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<sup>304</sup> *Mountain States Legal Found.*, 306 F.3d at 1138. The Utah District Court agreed. *See Utah Ass’n of Counties*, 316 F. Supp. 2d at 1192–1194 (rejecting Wilderness Act and other challenges to Grand Staircase–Escalante National Monument).

<sup>305</sup> 16 U.S.C. §§ 1–4 (2000).

<sup>306</sup> National Wildlife Refuge System Administration Act of 1966, 16 U.S.C. §§ 668dd–668ee (2000).

<sup>307</sup> *Mountain States Legal Found.*, 306 F.3d at 1138.

<sup>308</sup> *Id.*

<sup>309</sup> *See* 16 U.S.C. § 1 (2000) (providing that the Park Service shall regulate all park system lands, including monuments, to conform with the fundamental purposes of conserving park resources and providing for their enjoyment so as to leave them unimpaired for the enjoyment of future generations).

<sup>310</sup> 43 U.S.C. § 1712 (2000); 16 U.S.C. § 1604 (2000).

<sup>311</sup> 43 U.S.C. § 1701(a)(8) (2000).

<sup>312</sup> 16 U.S.C. §§ 1601, 1604 (2000). MUSYA also provides “that some land will be used for less than all resources.” *Id.* § 531(a).

<sup>313</sup> *Id.* § 431.

<sup>314</sup> *See* Justin James Quigley, *Grand Staircase–Escalante National Monument: Preservation or Politics?*, 19 J. LAND RESOURCES & ENVTL. L. 55, 84–85, 93–96 (1999) (describing proposals to

Antiquities Act power was effected when, in the wake of the Grand Teton designation, Congress forbade the President from creating any additional monuments in Wyoming absent express authorization.<sup>315</sup> Congress also limited, but did not prohibit, the use of the Antiquities Act power in Alaska when it enacted the Alaska National Interest Lands Conservation Act (ANILCA).<sup>316</sup>

Congress had more success reining in other presidential withdrawal powers. It revoked the President's authority to create new forest reserves in Wyoming and five other western states in 1907.<sup>317</sup> In 1910, Congress passed the Pickett Act, which was intended to restrict the President's power by allowing only *temporary* withdrawals of land.<sup>318</sup>

Subsequently, when Congress enacted FLPMA in 1976, it repealed the President's authority for most withdrawals and reservations, referring to *Midwest Oil* by name, along with 29 public lands statutes.<sup>319</sup> In doing so, Congress was acting on the recommendations of the Public Land Law Review Commission, a bipartisan entity forged from the compromise that became the Wilderness Act. The Commission's recommendations were actually much more sweeping:

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amend or rescind the Antiquities Act); Rasband, *supra* note 272, at 631–32 (describing congressional backlash and proposed bills in the wake of the Grand Staircase–Escalante National Monument designation).

<sup>315</sup> 16 U.S.C. § 431a (2000). Congress also restored some of the lands within the Grand Teton Monument to the Teton National Forest, while merging the remainder with the Grand Teton National Park. *Id.* §§ 406d-1, 482m.

<sup>316</sup> 16 U.S.C. §§ 3101–3233 (2000). ANILCA restricts new withdrawals in excess of 5,000 acres. *Id.* § 3213(a); *see also* Squillace, *supra* note 237, at 506–07 (discussing ANILCA's effect on Antiquities Act power).

<sup>317</sup> *See* Act of Mar. 4, 1907, ch. 2907, 34 Stat. 1271 (revoking authority for forest reserves in Oregon, Washington, Idaho, Montana, Colorado and Wyoming). The evening before he signed the bill into law, President Theodore Roosevelt, with the advice of Gifford Pinchot, proclaimed 32 new forest reserves and enlarged existing reserves in the restricted states. *See* Getches, *supra* note 268, at 286 (describing Roosevelt's proclamation of 32 new reserves and extension of forest reserves); PAUL W. GATES, HISTORY OF PUBLIC LAND DEVELOPMENT 580 (1968) (describing Pinchot's influence over Roosevelt's addition of over 150 million acres to the reserves).

<sup>318</sup> Act of June 25, 1910, ch. 421, § 1, 36 Stat. 847 (repealed 1976). Further, Pickett Act withdrawals were to remain open to development and disposition under the mining laws. *See id.* (stating that the President's temporary withdrawals “shall remain in force until revoked by him or an Act of Congress”); 43 U.S.C. § 142 (2000) (providing exceptions to withdrawals for settled land). Instead of restricting itself to temporary withdrawals, however, the executive branch continued to assert that it possessed all the implied powers it had enjoyed prior to the Pickett Act, and withdrew millions of acres from disposition with no judicial curtailment. *See* Getches, *supra* note 268, at 293–98 (analyzing a 1941 Attorney General opinion supporting the executive's interpretation that the Pickett Act did not limit withdrawal authority); *Portland Gen. Elec. Co. v. Kleppe*, 441 F. Supp. 859, 862 (D. Wyo. 1977) (upholding withdrawal of three million acres of oil shale lands from appropriation, and explaining that, even if the Pickett Act did curtail the President's implied authority to make withdrawals, congressional acquiescence over the course of over 60 years had restored the power).

<sup>319</sup> *See* 43 U.S.C. § 1714(a) (2000) (delegating power to the Secretary of Interior “to make, modify, extend or revoke withdrawals but only in accordance with the provisions and limitations of this section”). As originally enacted, section 1714(a) expressly stated that the President's implied authority “resulting from acquiescence of the Congress . . . [is] repealed.” Pub. L. No. 94-579, § 704(a), 90 Stat. 2744, 2792 (1976).

Large scale, limited or single use withdrawals of a permanent or indefinite term should be accomplished *only by act of Congress*. All other withdrawal authority should be expressly delegated with statutory guidelines to insure proper justification for proposed withdrawals, provide for public participation in their consideration, and establish criteria for executive action.<sup>320</sup>

Instead, either by oversight or intentionally, Congress left the President's Antiquities Act powers intact.<sup>321</sup> Secretarial withdrawals of over 5,000 acres, however, are governed by section 1714 of FLPMA, which requires opportunities for public participation and congressional approval if intended to last more than 20 years.<sup>322</sup> The Secretary of Interior may, however, take immediate, unilateral action to withdraw public lands for up to three years where "extraordinary measures must be taken to preserve values that would otherwise be lost."<sup>323</sup>

Most of the proposed legislative amendments that followed on the heels of the Grand Staircase–Escalante and other Clinton proclamations would require alternatives analysis and public or congressional notice prior to monument designation.<sup>324</sup> Others would require congressional approval for monuments in excess of 5,000 acres, effectively displacing the Antiquities Act with FLPMA-like withdrawal requirements.<sup>325</sup> None have passed, and for good reason.

FLPMA's authorization of short-term emergency withdrawals by the Secretary of the Interior is no substitute for presidential action, nor would any equivalent measure that gave limited or temporary power to the President work as well as the Antiquities Act. The need for swift, definitive action to prevent destruction or depletion of land and resources is, in many cases, compelling.<sup>326</sup> If the Grand Staircase had not been designated in 1996,

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<sup>320</sup> PUBLIC LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND 9 (1970) (emphasis added); *see also id.* at 54–56 (providing supporting arguments).

<sup>321</sup> *See* Getches, *supra* note 268, at 308, 315 (noting that Congress, through FLPMA, intended to rein in executive withdrawal authority, but did not repeal the Antiquities Act for reasons that are not clear in the legislative history).

<sup>322</sup> 43 U.S.C. § 1714(c)(1), (h) (2000).

<sup>323</sup> *Id.* § 1714(e).

<sup>324</sup> *See* Squillace, *supra* note 237, at 569–82 (analyzing and rejecting rationale underlying various proposals to amend or repeal the Act, including the National Monument NEPA Compliance Act, H.R. 1487, 106th Cong. (1999), and the National Monument Public Participation Act, S. 729, 106th Cong. (1999)).

<sup>325</sup> *See* National Monument Fairness Act of 2002, H.R. 2114, 107th Cong. (2002) (requiring that monument proclamations over 50,000 acres be transmitted to the Governor of the affected state for written comments, and that any such proclamation shall cease to be effective within two years unless approved by act of Congress); National Monument Fairness Act of 1997, S. 477, 105th Cong. (1997) (requiring that monuments in excess of 5,000 acres be approved in advance by Congress).

<sup>326</sup> Gregory S. Wetstone et al., *Damage Report: Environment and The 105th Congress*, SD47 ALI-ABA 31, 68 (Feb. 10, 1999); *see* Leshy, *supra* note 268, at 301–02 (2001) (making the case for swift, bold executive action before private rights become vested). *But see* Rasband, *supra* note 272, at 631 (arguing that President Clinton's proclamations were due to concerns about continuing activities rather than changes in use that created an immediate threat); Lin, *supra* note 236, at 735 (asserting that there was no true emergency facing many monuments).



its remarkable natural features may have been denuded to extract coal.<sup>327</sup> If the historic C&O Canal had not been designated in 1961, portions of it would have been paved for use as a highway, and if Marble Canyon had not been under consideration for designation in the late 1960s, it could have been inundated due to the construction of a dam.<sup>328</sup> The use of emergency to justify presidential withdrawals of public lands is a long-standing practice, flowing from President Taft's withdrawal of oil reserves in *Midwest Oil*.<sup>329</sup> Of course, emergency alone does not justify presidential action where the President lacks the constitutional power to act or where constitutionally protected rights are affected.<sup>330</sup>

Monument designations, however, are a legitimate exercise of Property Clause authority and do not displace constitutionally protected rights.<sup>331</sup> Valid existing rights are explicitly protected in most monument proclamations.<sup>332</sup> While others who hoped to use public lands for future grazing, logging, or other activities may be disappointed, absent valid existing rights, they had no legally protected right to engage in such activities.<sup>333</sup> Moreover, new or continuing development is not necessarily precluded by monument designation; activities that are compatible with "the proper care and management of the objects to be protected"<sup>334</sup> can proceed. Presidential proclamations can be flexible enough to allow uses that are appropriate to the protection of the values prioritized and protected by designation. Many of President Clinton's landscape monuments are, at least to some extent, "working monuments," where grazing and even timber harvest are allowed under the terms of the proclamations.<sup>335</sup> The assertion

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<sup>327</sup> See *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1184 (D. Utah 2004) (describing President's concerns about the destructive effects of coal mining in the area); Tom Kenworthy, *Clinton May Bar Developers in Utah*, DENVER POST, Sept. 8, 1996, at A2 (reporting that a Dutch firm, Andalex Resources Inc., had planned to develop the Kaiparowits Plateau, an undeveloped region within the monument boundaries).

<sup>328</sup> See Wetstone et al., *supra* note 326, at 68 (discussing threats to the C&O Canal and the Grand Canyon); Squillace, *supra* note 237, at 501 (noting that Congress passed legislation prohibiting the construction of dams anywhere in the Grand Canyon shortly before the Marble Canyon declaration was issued). Marble Canyon has since become part of Grand Canyon National Park. Grand Canyon National Park Enlargement Act, 16 U.S.C. §§ 228a, 228b (2000).

<sup>329</sup> See *United States v. Midwest Oil Co.*, 236 U.S. 459, 469 (1915) (upholding withdrawal by proclamation as power that "dates from an early period in the history of the government").

<sup>330</sup> See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2648 (2004) (citing *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 164–65 (1963) ("The imperative necessity for safeguarding . . . rights to procedural due process under the gravest of emergencies has existed throughout our constitutional history, for it is then, under the pressing exigencies of crisis, that there is the greatest temptation to dispense with guarantees which, it is feared, will inhibit government action.")); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952) (invalidating President Truman's order to take over steel manufacturing to prevent a labor dispute from stopping wartime production).

<sup>331</sup> See *supra* Part III.A for a discussion of Property Clause delegation.

<sup>332</sup> Squillace, *supra* note 237, at 516 n.277, 547.

<sup>333</sup> See, e.g., *United States v. Fuller*, 409 U.S. 488 (1973) (stating that grazing permits create no property rights).

<sup>334</sup> 16 U.S.C. § 431 (2000). New mineral leases in monuments are, however, precluded under the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (2000).

<sup>335</sup> See Kathie Durbin, *On a New National Monument, Has an Agency been Cowed?*, HIGH COUNTRY NEWS, Nov. 10, 2003, at 5 (describing ongoing study of grazing on nine existing grazing

that states and local governments lose economic resources when federal lands become national monuments is also shaky. In many cases, economic returns from increased recreation and tourism that accompany landscape preservation are far greater than resource extraction would have provided.<sup>336</sup>

This is not to say that the Antiquities Act is a perfect or comprehensive preservation tool. Like the criteria listed in the Wilderness Act for designating wilderness areas, the Antiquities Act fails to provide any particular guidelines with regard to scientific values or biodiversity.<sup>337</sup> The Antiquities Act does not prioritize the most ecologically valuable lands, and areas are not necessarily chosen for protection because of their biodiversity resources but instead are chosen for political or aesthetic reasons or because they are facing development pressure.<sup>338</sup>

Management measures for monuments are not as protective or prescriptive as those required for wilderness areas. For example, the executive order for the Giant Sequoia National Monument, to be managed by the Forest Service, directs that “[r]emoval of trees . . . may take place only if clearly needed for ecological restoration and maintenance of public safety.”<sup>339</sup> Just a few years after its designation, the Forest Supervisor recharacterized the monument as “an experimental forest,” where a variety of management scenarios—including commercial logging—can be tested for effects on forest health.<sup>340</sup> The final monument management plan allows the removal of 7.5 million board feet of timber per year on nearly 64,000 acres during the first decade of the planning period.<sup>341</sup> Logging could be highly disruptive of biodiversity values in the area, but the Antiquities Act would allow it so long as the decision comports with the Act’s minimal directive for “the proper care and management of the objects to be protected.”<sup>342</sup> In contrast, commercial logging in wilderness areas is precluded by the Wilderness Act.<sup>343</sup>

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permits on the Cascade–Siskiyou National Monument); Matt Weiser, *Giant Sequoias Could Get the Ax*, HIGH COUNTRY NEWS, June 9, 2003, at 4; see Heidi M. Biasi, *The Antiquities Act of 1906 and Presidential Proclamations: A Retrospective and Prospective Analysis of President William J. Clinton’s Quest to “Win the West”*, 9 BUFF. ENVTL. L.J. 189, 218–19 (describing the expanded purposes of Clinton’s use of the Antiquities Act to protect entire ecosystems).

<sup>336</sup> See *supra* note 61. On the other hand, western culture and individual lifestyles can be profoundly affected by monument designation and, more generally, the rapidly changing demographics of the West, where jobs in service industries predominate over traditional jobs in resource extraction. See Rasband, *supra* note 58, at 27, 50–61.

<sup>337</sup> See 16 U.S.C. §§ 431, 1131 (2000).

<sup>338</sup> See Rusnak, *supra* note 253, at 709 (discussing President Clinton’s political motivations in declaring the Grand Staircase–Escalante National Monument on the eve of reelection).

<sup>339</sup> Proclamation No. 7295, 65 Fed. Reg. 24,095 (Apr. 1, 2000).

<sup>340</sup> Weiser, *supra* note 335.

<sup>341</sup> GIANT SEQUOIA FEIS, *supra* note 267, Summary, at tbl. II-3. Harvest may include trees up to 130 years old and 30 inches in diameter. *Id.*

<sup>342</sup> 16 U.S.C. § 431 (2000). Monument management must also comply with NEPA, 42 U.S.C. § 4332 (2000), the Endangered Species Act, 16 U.S.C. §§ 1536, 1538 (2000), and NFMA, 16 U.S.C. § 1604 (2000).

<sup>343</sup> See 16 U.S.C. § 1133(c) (2000) (prohibiting permanent roads and commercial enterprises).

Similar pressures face BLM in the management of its new national monuments, as user groups with long-standing access to the agency attempt to continue their activities. Thus far, BLM seems to be managing its monuments, through its planning processes, in a fashion compatible with the objectives of the Antiquities Act. Professor Robert Keiter, in assessing the management plan for the Grand Staircase–Escalante National Monument, concluded that it “basically fulfills the BLM’s preservationist responsibilities to the new Monument, while also addressing local social-economic concerns and introducing new ecosystem management protocols.”<sup>344</sup> The plan expresses two basic principles: to protect the Monument in its primitive, frontier state and to provide compatible opportunities for scientific and historical research.<sup>345</sup> Yet Escalante and several other BLM monuments, including Missouri River Breaks, Canyons of the Ancients, and Carrizo Plain, have been targeted for mineral development under the Bush–Cheney National Energy Policy of 2001, and it remains to be seen whether the agency will resist pressure to allow development.<sup>346</sup>

Proponents of legislation prescribing notice and various predesignation procedures are correct in that the streamlined process that accompanies presidential proclamations silences valuable sources of information. Sidestepping public involvement can diminish the accuracy of the proclamation in inventorying important resources and uses and setting monument boundaries, as well as the public’s acceptance of the national monument itself. The public’s views, however, are an important component of post-proclamation planning processes for management of the monuments, and many concerns can be aired and addressed at that time. Moreover, if a declaration is perceived as way off the mark, Congress can abrogate it at any time—although it has only very rarely done so.<sup>347</sup>

In the end,

Our nation would be poorer—much poorer—if the mining, logging, and livestock industries had succeeded in blocking the creation or expansion of the Grand Canyon National Monument, the Jackson Hole National Monument, or the Mount Olympus National Monument, to name just a few of the controversial monuments that might never have been designated or expanded. And that legacy was possible only because the law works simply and in one direction,

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<sup>344</sup> Keiter, *supra* note 143, at 525–26.

<sup>345</sup> *Id.*

<sup>346</sup> See Michael Satchell, *Monumental Heritage*, NAT’L WILDLIFE, Dec. 2001/Jan. 2002, <http://www.nwf.org/nationalwildlife/article.cfm?articleId=81&issueId=70> (discussing the National Energy Policy). The Missouri River Breaks declaration and others explicitly allow development to continue on existing oil and gas leases, *see* Proclamation No. 7398, 66 Fed. Reg. 7359, 7360 (Jan. 17, 2001), but new mineral leases are precluded by the Mineral Leasing Act of 1920, 30 U.S.C. § 181 (2000).

<sup>347</sup> See Keiter, *supra* note 14, at 531–32 (noting that only ten monuments had been abrogated); *see also* Squillace, *supra* note 237, at 550, 580–82 (describing public support for, and durability of, national monuments created over the course of the past century).

authorizing the President to protect land, and leaving it to the Congress to decide whether to lessen, or perhaps strengthen, those protections.<sup>348</sup>

### *B. Rulemaking, Planning, and Agency Discretion*

In the waning days of the Clinton Administration, the Forest Service prohibited road construction on 58 million acres—30 percent—of the National Forest lands in a Roadless Rule<sup>349</sup> characterized as the “most significant land conservation initiative in nearly a century.”<sup>350</sup> Rulemaking is only one of several administrative tools for preserving wild lands from mining, grazing, timber harvest, high-impact recreation, and other potentially destructive uses.<sup>351</sup> Prior to the Roadless Rule, the Forest Service had a long but somewhat checkered history of limiting activities in wild areas by designating them as primitive areas, Research Natural Areas (RNAs), or other protective classifications in its forest plans. In spite of its own administrative efforts and the Wilderness Act’s provisions for inventorying and recommending unroaded areas for protection, nearly three million acres of roadless areas on National Forest lands have been developed in the past two decades.<sup>352</sup> The Roadless Rule was intended to put the brakes on road construction via uniform protection for unroaded forest lands across the nation.

The Secretary of the Interior also has authority to withdraw public lands from settlement, sale, location, or entry using the procedures detailed in FLPMA.<sup>353</sup> Further, BLM may identify and protect wild land preserves, including RNAs and Areas of Critical Environmental Concern (ACECs), through its planning and rulemaking processes. The use of administrative processes to protect wild lands, whether accomplished through the Roadless Rule, FLPMA withdrawals, planning, or other comparable administrative initiatives, is supported by each agency’s organic management statutes.

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<sup>348</sup> Squillace, *supra* note 237, at 582–83.

<sup>349</sup> Roadless Area Conservation Rule, 66 Fed. Reg. 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt 294).

<sup>350</sup> *Wyoming v. United States Dep’t of Agric.*, 277 F. Supp. 2d 1197, 1220 (D. Wyo. 2003); *see also* Blumm, *supra* note 207, at 10,398 (describing the Roadless Rule as a more significant conservation achievement than Clinton’s national monuments).

<sup>351</sup> While FLPMA generally provides that “the Secretary shall, by regulation or otherwise, take any action necessary to prevent unnecessary or undue degradation of the lands,” 43 U.S.C. § 1732(b) (2000), this Article focuses on administrative measures that provide special protective designations for BLM lands.

<sup>352</sup> *See Kootenai Tribe of Idaho v. Veneman (Kootenai Tribe)*, 313 F.3d 1094, 1105 (9th Cir. 2002) (describing the rulemaking process resulting in the Roadless Rule and the impetus to preserve unroaded forest lands).

<sup>353</sup> 43 U.S.C. § 1714 (2000). Approximately 165 million acres, or 20%, of BLM lands had been withdrawn from disposition under the hard rock mining laws as of the late 1990s. ROCKY MOUNTAIN MINERAL LAW FOUNDATION, AMERICAN LAW OF MINING 3-30 (1998).

## 1. Primitive Areas, RNAs, and Other Administrative Preserves

### a. National Forest Primitive Areas

As early as the 1920s, the Forest Service had begun to limit timber harvest and other extractive activities pursuant to its general powers under the Forest Service Organic Administration Act of 1897 (Organic Act).<sup>354</sup> The Organic Act, much of which remains in place today, directs the Secretary of Agriculture to “make provisions for the protection against destruction by fire and depredations . . . and . . . make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction.”<sup>355</sup>

The general authority of the Organic Act was invoked for the purposes of preservationist ends in 1924 when assistant forester Aldo Leopold proposed to set aside an area within the Gila National Forest as the first official wild preserve in the Forest System.<sup>356</sup> Leopold recognized that his proposal would be “rank heresy to some minds,” but believed that the recreational opportunities provided through wild land preservation could be reconciled with utilitarian goals.<sup>357</sup>

Subsequently, Regulation L-20, issued in 1929, provided formal prescriptions for establishing and managing “primitive areas.”<sup>358</sup> It established broad management guidelines to maintain relatively natural conditions “for purposes of public education and recreation,” but allowed timber harvesting, grazing, and mining to continue.<sup>359</sup>

During the 1930s, wilderness policies were strengthened under the leadership of Bob Marshall, head of the Forest Service Division of Recreation and Lands.<sup>360</sup> Regulation L-20 was replaced with the “U Regulations,” which provided for classification of undeveloped areas into three categories: wilderness, wild, or primitive.<sup>361</sup> Roads, motorized vehicles, and logging were prohibited in wilderness and wild areas.<sup>362</sup> The U Regulations became the basis for the Wilderness Act of 1964.<sup>363</sup>

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<sup>354</sup> 16 U.S.C. §§ 473–478, 479–482, 551 (2000). For a description of early Forest Service preservation efforts, see McCloskey, *supra* note 101, at 296.

<sup>355</sup> 16 U.S.C. § 551 (2000).

<sup>356</sup> McCloskey, *supra* note 101, at 296–97. At around the same time, portions of the Superior National Forest, now known as the Boundary Waters Canoe Area Wilderness, were given administrative protection, and road building was prohibited in the White River National Forest to preserve the primeval “mood” of Trappers Lake basin. *Id.*

<sup>357</sup> WILKINSON & ANDERSON, *supra* note 53, at 336 (quoting Aldo Leopold, *The Wilderness and its Place in Forest Recreational Policy*, 19 J. FORESTRY 718, 719 (1921)).

<sup>358</sup> *Id.* at 338.

<sup>359</sup> *Id.* at 339.

<sup>360</sup> *Id.* at 340; NASH, *supra* note 65, at 205.

<sup>361</sup> *McMichael v. United States*, 355 F.2d 283, 286 (9th Cir. 1965) (citing 36 C.F.R. § 216.20 (1939)).

<sup>362</sup> See *id.* (citing 36 C.F.R. § 251.21(a) (1963) and noting that the prohibition against motorized vehicles was subsequently extended to primitive areas).

<sup>363</sup> See *supra* Part IV.B for a discussion of the Forest Service’s experiences with the

The agency's ability to protect early preserves from destruction was tested in *McMichael v. United States*, which upheld a conviction for operating a motorized vehicle in a protected area in violation of the U Regulations.<sup>364</sup> The Ninth Circuit held that the Organic Act provides authority to protect wild lands, and noted that the Wilderness Act, passed while the case was pending, evidenced congressional support for preservation.<sup>365</sup> In response to the defendant's arguments that the area was not unique or otherwise suitable for protection, the court found that the choice of lands to be preserved is an administrative choice not subject to judicial review.<sup>366</sup>

While the Organic Act provides the Forest Service with authority to regulate use and occupancy of National Forest lands to preserve them from destruction, MUSYA directs that National Forests be managed by MUSY principles.<sup>367</sup> Courts have acknowledged that MUSYA, like the Organic Act, provides the Secretary of Agriculture with authority to preserve wild lands.<sup>368</sup> In *Parker v. United States*,<sup>369</sup> the Tenth Circuit affirmed the injunction of a timber sale that could have destroyed the natural conditions of an "untrammeled" subalpine area adjacent to a primitive area that qualified for wilderness classification.<sup>370</sup> It concluded that the Wilderness Act should not be interpreted as a general curtailment of discretion in day-by-day administration of the forests; instead the Act affords the President and Congress "a meaningful opportunity to add contiguous areas predominantly of wilderness value to existing primitive areas for final wilderness designation."<sup>371</sup>

#### *b. RNAs*

Around the same time as the creation of the Gila primitive area, the Forest Service established its Research Natural Area network to foster long-

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Wilderness Act.

<sup>364</sup> 355 F.2d at 286.

<sup>365</sup> *Id.* at 285–86. The court also found support in MUSYA, 16 U.S.C. §§ 528–531 (2000); *McMichael*, 355 F.2d at 286.

<sup>366</sup> *See McMichael*, 355 F.2d at 286 (concluding that "recreational needs are valid considerations. The area is preserved not because it is, due to its peculiar character, in need of special protection; it is preserved in order to provide the public with an area of wilderness.").

<sup>367</sup> 16 U.S.C. § 529 (2000).

<sup>368</sup> *See, e.g., McMichael*, 355 F.2d at 286 (upholding conviction for operating motorized vehicle in a primitive area); *Seattle Audobon Soc'y v. Lyons*, 871 F. Supp. 1291, 1316 (W.D. Wash. 1994) (finding protection of viable populations of forest species through protective land designations consistent with MUSYA and NFMA), *aff'd*, 80 F.3d 1401 (9th Cir. 1996); *Parker v. United States*, 309 F. Supp. 593, 597 (D. Colo. 1970) (enjoining logging in untrammeled area contiguous to primitive wilderness area in White River National Forest), *aff'd*, 448 F.2d 793 (10th Cir. 1971). *Cf. Park Lake Res. Ltd. Liab. Corp. v. United States Dep't of Agric.*, 979 F. Supp. 1310 (D. Colo. 1997) (upholding designation of research natural area over miners' Administrative Procedure Act challenge), *vacated on jurisdictional grounds*, 197 F.3d 448 (10th Cir. 1999).

<sup>369</sup> 448 F.2d 793 (10th Cir. 1971).

<sup>370</sup> *Id.* at 797–98.

<sup>371</sup> *Id.* at 796–97.

term research capabilities.<sup>372</sup> The first RNA, the Santa Carolina, was designated in the Coronado National Forest in 1927, and today there are approximately 400 Forest Service RNAs covering about 500,000 acres.<sup>373</sup> These RNAs are extremely diverse, ranging from grasslands to alpine tundra, from low to high elevation, and from very small to very large areas. The majority of Forest Service RNAs are smaller than 2,500 acres, but a number of them, mostly in the West, are larger than 5,000 acres.<sup>374</sup>

Although the Forest Service has been a leader in establishing RNAs, several agencies currently manage them, including BLM, the National Park Service, the Fish and Wildlife Service and the Army Corps of Engineers.<sup>375</sup> There appears to be no unifying principle for the identification or management of RNAs, with each agency utilizing its own organic legislation to justify managing its lands for ecological research purposes.

Like the early primitive areas, the Forest Service's authority to preserve RNAs has also been upheld as an appropriate means of effectuating land management statutes.<sup>376</sup> Although none of the statutes explicitly refer to RNAs, NFMA promotes the use of planning and science in forest management.<sup>377</sup> NFMA section 1604 directs the Secretary to promulgate planning regulations that provide for research and evaluation of the effects of management.<sup>378</sup> Plans are to provide for continuous monitoring and assessment in the field to insure that management measures do not produce substantial and permanent impairment of the land's productivity.<sup>379</sup> Forest plans provide for multiple uses, including wildlife and wilderness,<sup>380</sup> in light

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<sup>372</sup> U.S. FOREST SERV., ABOUT RNAs, at [http://rna.nris.state.mt.us/rna\\_about.html](http://rna.nris.state.mt.us/rna_about.html) (last visited Nov. 14, 2004) [hereinafter ABOUT RNAs].

<sup>373</sup> *Id.* About half of Forest Service RNAs are in the western United States. *Id.*

<sup>374</sup> The smallest RNA is 30 acres, while the largest is over 24,000 acres. *Id.* In Region 2, for example, there are 17 RNAs and two proposed RNAs that exceed 5,000 acres. U.S. FOREST SERV., RESEARCH NATURAL AREAS, at [http://rna.nris.state.mt.us/search\\_region.asp](http://rna.nris.state.mt.us/search_region.asp) (last visited Sept. 30, 2004) (displaying search results for "Region 2" and "greater than or equal to 5,000 acres").

<sup>375</sup> OREGON NATURAL HERITAGE PROGRAM, at <http://oregonstate.edu/ornhic/rna.html> (last visited Nov. 14, 2004); see ABOUT RNAs, *supra* note 372 (noting that, as of the late 1970s, Forest Service RNAs comprised one-third of the established network of RNAs); NAT'L PARK SERVICE, SUMMARY CHART OF SPECIAL DESIGNATION AREAS, at <http://www.nature.nps.gov/rm77/SpecialDesignations/Exhibit1.htm> (last visited Sept. 17, 2004) (describing RNAs, first established in the National Parks in 1966, as "[a]n old but underutilized concept on NPS lands"). The Department of Energy hosts a similar network on its lands, see U.S. DEP'T OF ENERGY, NATIONAL ENVIRONMENTAL RESEARCH PARKS, at <http://nerp.esd.ornl.gov/overview.html> (last visited Nov. 14, 2004) (describing a two million acre collection of research parks, designed as protected, outdoor laboratories to provide opportunities for environmental studies). For a discussion of BLM RNAs, see *infra* notes 394-403 and accompanying text.

<sup>376</sup> See *Park Lake Res. Ltd. Liab. Corp. v. United States Dep't of Agric.*, 979 F. Supp. 1310, 1315 (D. Colo. 1997), *vacated on jurisdictional grounds*, 197 F.3d 448 (10th Cir. 1999).

<sup>377</sup> 16 U.S.C. §§ 1601-1614 (2000).

<sup>378</sup> *Id.* § 1604 (g)(2)(B), (g)(3)(B).

<sup>379</sup> *Id.* § 1601(a)(2).

<sup>380</sup> *Id.* § 1604(e)(1).

of the lands' availability and suitability for resource management.<sup>381</sup> The use of Forest System lands must be consistent with plans.<sup>382</sup>

Areas with undisturbed physical features and natural ecological processes may be identified as RNAs during the planning process.<sup>383</sup> The regulations governing RNA establishment provide,

[W]hen appropriate, the Chief shall establish a series of research natural areas, sufficient in number and size to illustrate adequately or typify for research or educational purposes, the important forest region, as well as other plant communities that have special or unique characteristics of scientific interest and importance.<sup>384</sup>

The *Forest Service Manual (Manual)* provides additional detail, directing the agency to

[L]ocate those research natural areas that best represent the ecological conditions needed to complete the natural area system in areas where conflicting uses are minimal. Whenever possible, select proposed areas that show no evidence of major disturbances by humans, such as livestock grazing or timber cutting, for the past 50 years.<sup>385</sup>

It notes that a "pristine condition is the goal," but the agency may select altered areas that reflect natural conditions as closely as possible if pristine areas are unavailable.<sup>386</sup>

With respect to size, the *Manual* specifies that RNAs must be "large enough to provide essentially unmodified conditions within their interiors . . . and to protect the features and/or qualities for which the [RNA] is to be established."<sup>387</sup> In the West, 300 acres (121.4 hectares) is the minimum desirable size, but in the East, smaller areas may be appropriate for RNA consideration, especially in areas "with special vegetative, aquatic, or geologic situations."<sup>388</sup>

RNA management regulations direct that RNAs be "retained in a virgin or unmodified condition except where measures are required to maintain a plant community which the area is intended to represent."<sup>389</sup> Accordingly, "occupancy under a special-use permit shall not be allowed, nor the construction of permanent improvements permitted except improvements

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<sup>381</sup> *Id.* § 1604(k).

<sup>382</sup> *Id.* § 1604(i) (2000).

<sup>383</sup> ABOUT RNAs, *supra* note 372.

<sup>384</sup> 36 C.F.R. § 251.23 (2003).

<sup>385</sup> MANUAL, *supra* note 201, § 4063.2, <http://www.fs.fed.us/im/directives/fsm/4000/4060.txt>.

<sup>386</sup> The manual continues that neither the presence of exotic species nor the failure to withdraw an area from mineral entry necessarily precludes establishing an RNA if the area qualifies in other respects. *Id.* § 4063.2.

<sup>387</sup> *Id.* § 4063.1. "Where possible, select entire small drainages because they maintain interrelationships of terrestrial and aquatic systems, particularly valuable as baseline areas for research and monitoring, and because they are easier to delineate and protect on the ground." *Id.* § 4063.2.

<sup>388</sup> *Id.* § 4063.1.

<sup>389</sup> 36 C.F.R. § 251.23 (2003).



required in connection with their experimental use, unless authorized by the Chief of the Forest Service.”<sup>390</sup>

There are few published cases involving RNAs, but the United States District Court for the District of Colorado upheld the designation of an RNA in *Park Lake Resources Ltd. Liability Corp. v. United States Department of Agriculture*.<sup>391</sup> The plaintiffs, hard rock miners, claimed that the designation of the Hoosier Ridge RNA did not satisfy the regulatory requirement that RNAs “be retained in a virgin or unmodified condition” due to the existence of an old mining shaft.<sup>392</sup> The court rejected the argument, concluding that the requirement that RNAs be *retained* in such a condition concerns management of the RNA rather than its initial designation.<sup>393</sup> RNAs may be included in the system in spite of human incursions, including mining, so long as they are representative of the region or special or unique plant communities.<sup>394</sup> Once an RNA is designated, management measures, including road construction, are restricted to ensure that the RNA be “retained in a virgin or unmodified condition” for the purposes of conducting research, maintaining biodiversity, and promoting education.<sup>395</sup>

Like the Forest Service, BLM manages a network of RNAs.<sup>396</sup> BLM’s regulations provide “for the management and protection of public lands having natural characteristics that are unusual or that are of scientific or other special interest.”<sup>397</sup> This provision effectuates conservation and research objectives which, in turn, advance the congressional policy expressed in FLPMA to inventory the public lands and their resources systematically<sup>398</sup> and to “protect the quality of scientific, scenic, historical, ecological, environmental, air, and atmospheric, water resource, and archeological values.”<sup>399</sup>

BLM’s RNA network has grown dramatically in the past 25 years, from only 20 RNAs in 1978 to over 160 RNAs totaling about 320,000 acres in

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<sup>390</sup> *Id.*

<sup>391</sup> 979 F. Supp. 1310 (D. Colo. 1997), *vacated on jurisdictional grounds*, 197 F.3d 448 (10th Cir. 1999).

<sup>392</sup> *Id.* at 1313 (citing 36 C.F.R. § 251.23).

<sup>393</sup> *Id.* at 1314.

<sup>394</sup> *Id.*; see MANUAL, *supra* note 201, § 4063.2 (stating that mineral entry does not preclude RNA establishment), <http://www.fs.fed.us/im/directives/fsm/4000/4060.txt>.

<sup>395</sup> See 36 C.F.R. § 251.23 (2003) (restricting permanent in national forest RNAs unless it is for experimental use); *Park Lake Res. Ltd. Liab. Corp. v. United States Dep’t of Agric.*, 197 F.3d 448, 451 (10th Cir. 1999) (discussing prohibitions on destructive activities such as mineral entry); *Shawnee Trail Conservancy v. United States Dep’t of Agric.*, 222 F.3d 383, 385 (7th Cir. 2000) (dismissing a challenge to restrictions on mountain bikes, all-terrain vehicles, and horses in various RNAs on jurisdictional grounds).

<sup>396</sup> *Federal Land Management Programs*, 57 CONG. DIGEST 291, 293 (1978).

<sup>397</sup> 43 C.F.R. § 8223.0-1 (2003).

<sup>398</sup> See 43 U.S.C. § 1701(a)(2) (2000) (stating that “the national interest will be best realized if the public lands and their resources are periodically and systematically inventoried”); *id.* § 1711 (directing that the inventory “be kept current so as to reflect changes in conditions and to identify new and emerging resource and other values”); *id.* § 1712(c)(2) (requiring that land use plans “use a systematic interdisciplinary approach to achieve integrated consideration of physical, biological, economic, and other sciences”).

<sup>399</sup> *Id.* § 1701(a)(8).

2003.<sup>400</sup> RNAs can be found within wilderness, ACECs, and other special designations, and are used to monitor long-term change and provide baseline data for comparison with more intensively managed BLM lands.<sup>401</sup>

BLM defines an RNA as

an area that is established and maintained for the primary purpose of research and education because the land has one or more of the following characteristics: (1) A typical representation of a common plant or animal association; (2) an unusual plant or animal association; (3) a threatened or endangered plant or animal species; (4) a typical representation of common geologic, soil, or water features; or (5) outstanding or unusual geologic soil, or water features.<sup>402</sup>

Similar to the Forest Service system, the purpose of BLM's RNA system is to provide for scientific study, research, and demonstration.<sup>403</sup> Uses are limited to ensure that no one uses, occupies, constructs, or maintains facilities in a manner inconsistent with the RNA's purpose, and that scientists and educators use the area in a nondestructive manner.<sup>404</sup> The prohibitions against destructive uses and construction of any facilities in a manner inconsistent with the research purposes would likely preclude roads and other high impact physical structures.<sup>405</sup>

In terms of their management, RNAs are something like "mini wildernesses," but the emphasis on research makes them unique.<sup>406</sup> Investigating physical and biological processes over long periods of time and wide spatial scales is key to understanding and managing complex ecological systems.<sup>407</sup> Consequently, undisturbed areas such as RNAs are

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<sup>400</sup> BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, PUB. LANDS STATISTICS, at tbl. 5-16 (2003), [http://www.blm.gov/natacq/pls03/pls5-16\\_03.pdf](http://www.blm.gov/natacq/pls03/pls5-16_03.pdf) [hereinafter BLM STATISTICS]; see Federal Land Management Programs, 57 CONG. DIGEST 291, 293 (1978) (noting that there were only 20 BLM RNAs in 1978, totaling 45,000 acres in Alaska, Arizona, Colorado, Idaho, Nevada, Oregon and Utah).

<sup>401</sup> See, e.g., BUREAU OF LAND MGMT., U.S. DEP'T OF THE INTERIOR, INSTRUCTION MEMORANDUM NO. CA-97-31, STATE DIRECTOR'S POLICY AND PROCEDURES FOR ESTABLISHING RESEARCH NATURAL AREAS IN CALIFORNIA (1996), <http://www.blm.gov/nhp/efoia/ca/Public/IMS/1997/CAIM97-031—P.html> (listing RNAs and ACECs in California, and noting that many ACECs include "relatively pristine natural plant communities" but that it would be "impossible to scientifically manage [these] communities . . . without adequate control areas" such as RNAs).

<sup>402</sup> 43 C.F.R. § 8223.0-1(a) (2003).

<sup>403</sup> *Id.* § 8223.0-6.

<sup>404</sup> *Id.* § 8223.1.

<sup>405</sup> *Id.* § 8223.1.

<sup>406</sup> See 16 U.S.C. § 1133(c) (2000) (prohibiting roads and commercial activities in designated wilderness).

<sup>407</sup> David Foster et al., *The Importance of Land-Use Legacies to Ecology and Conservation*, 53 *BIOSCIENCE* 77, 86-87 (2003); USDA FOREST SERVICE, RESEARCH NATURAL AREAS PROGRAM: NATIONAL STRATEGY—OPPORTUNITIES FOR THE FUTURE 1 (1993), [http://rna.nris.state.mt.us/pubs/RNA\\_National\\_Strategy.pdf](http://rna.nris.state.mt.us/pubs/RNA_National_Strategy.pdf). The National Science Foundation heightened awareness of long-term research needs in 1980 by establishing its Long Term Ecological Research (LTER) program to coordinate and support research on long-term ecological phenomena. A diverse array of ecosystems and research emphases are represented

invaluable for studying ecosystems and their component parts, and for monitoring succession and other long-term ecological change.<sup>408</sup> Nonmanipulative research in RNAs can be used as a benchmark for comparison with studies conducted in adjacent or similar areas subject to more intensive management measures.<sup>409</sup> Even though most RNAs are too small to fully effectuate biodiversity objectives, together they represent significant ecological and scientific values and form a crucial component of an overall preservation strategy for the public lands.<sup>410</sup>

*c. Late Successional Reserves and ACECs*

Pursuant to NFMA, forest plans must not only utilize scientifically sound management, but, more specifically, must provide for the diversity of plant and animal species.<sup>411</sup> According to the 1982 Forest Service regulations, this means that plans must support viable populations of species.<sup>412</sup> The regulations have been construed to require the Forest Service to provide sufficient habitat "to support, at least, a minimum number of reproductive individuals."<sup>413</sup> In addition, habitat must be well distributed so that individuals can interact with each other in the planning area.<sup>414</sup>

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by its 24 LTER sites. NATIONAL SCIENCE FOUNDATION, LONG TERM ECOLOGICAL RESEARCH NETWORK, at <http://lternet.edu/> (last visited Nov. 14, 2004).

<sup>408</sup> Noss, *supra* note 4, at 529; see Foster, *supra* note 407, at 86–87 (describing LTER and similar research programs that enable identification of land use impacts, restoration opportunities, and desired future ecosystem condition).

<sup>409</sup> Noss, *supra* note 4, at 529.

<sup>410</sup> See *id.* (noting that most RNAs likely suffer from edge effects, given their size, but that they are still valuable from a biodiversity standpoint).

<sup>411</sup> 16 U.S.C. § 1604(g)(3)(B)–(C) (2000).

<sup>412</sup> 36 C.F.R. § 219.20(2)(ii) (2003). The planning regulations were revised in 2000, see National Forest System Land and Resource Management Planning, 65 Fed. Reg. 67,514–67,568–81 (Nov. 9, 2000) (to be codified at 36 C.F.R. pts. 217, 219), but the ink had barely dried when new revisions were proposed to address concerns about the flexibility and clarity of the 2000 revisions, see National Forest System Land and Resource Management Planning, 67 Fed. Reg. 72,770 (Dec. 6, 2002) (to be codified at 36 C.F.R. pt. 219). The 2000 revision emphasized sustainable ecosystem-level processes, see 65 Fed. Reg. at 67,514, while the subsequent proposal gives two possible options for meeting the diversity requirement, one of which is based on viable populations of species while the second calls for "maintenance and restoration of biological diversity in the plan area, at ecosystem and species levels, within the range of diversity characteristic of native ecosystems in the larger landscape," 67 Fed. Reg. at 72,784. Several interim rules have extended the transition period for forest plan amendments or revisions and for site-specific projects until new planning regulations are finalized. See National Forest System Land and Resource Management Planning: Extension of Compliance Deadline, 67 Fed. Reg. 35,431 (May 20, 2002); National Forest System Land and Resource Management Planning: Extension of Compliance Deadline for Site-Specific Projects, 68 Fed. Reg. 53,294 (Sept. 10, 2003). Meanwhile, the 1982 version applies to existing plans and some revisions and amendments. 36 C.F.R. § 219.35(b) (2003).

<sup>413</sup> *Utah Envtl. Cong. v. Bosworth*, 285 F. Supp. 2d 1257, 1267 (D. Utah 2003); see also *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1317 (W.D. Wash. 1994), *aff'd*, 80 F.3d 1401 (9th Cir. 1996).

<sup>414</sup> See *Utah Envtl. Congress*, 285 F. Supp. 2d at 1267 (quoting forest planning regulation); *Seattle Audubon Soc'y*, 871 F. Supp. at 1315 (discussing NFMA's monitoring and viability objectives).

According to *Seattle Audubon Society v. Lyons*, these provisions allow, and in some cases require, the protection of special areas to promote ongoing research and monitoring of ecological conditions as well as landscape-level ecosystem integrity.<sup>415</sup>

*Seattle Audubon Society* involved a challenge to the Northwest Forest Plan, which covers over twenty million acres of Forest Service and BLM lands in the Pacific Northwest.<sup>416</sup> The Plan was precipitated by the decline of the northern spotted owl (*Strix occidentalis caurina*), a federally protected species, and was designed to protect dozens of species reliant on old-growth habitat throughout the owl's range.<sup>417</sup> Through amendments to the plans for 19 forests and seven BLM districts, the Plan created Late Successional Reserves and other protected categories of land, where commercial logging and other potentially destructive activities are restricted.<sup>418</sup> The court interpreted NFMA's provisions to allow, and in cases where the viability of broad ranging species is at issue to require, coordinated landscape-level planning to satisfy diversity needs, and upheld the Plan.<sup>419</sup>

FLPMA has no parallel diversity provision, but it does direct BLM to "give priority to the designation and protection of [ACECs]" in its planning processes.<sup>420</sup> ACECs are areas "where special management attention is required . . . to protect and prevent irreparable damage to important historic, cultural, or scenic values, fish and wildlife resources or other natural systems or processes, or to protect life and safety from natural hazards."<sup>421</sup> The ACEC mandate provides BLM with an important tool for responding to biodiversity needs.<sup>422</sup>

Although BLM manages over 900 ACECs totaling nearly 13 million acres of land,<sup>423</sup> the potential of ACECs for preserving biodiversity and wild lands

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<sup>415</sup> 871 F. Supp. at 1307.

<sup>416</sup> *Id.* at 1304. Nineteen million acres covered by the Plan are administered by the Forest Service, while nearly three million are managed by BLM. *Id.*

<sup>417</sup> *See id.* at 1300–02 (providing a chronology of the events leading up to the Plan).

<sup>418</sup> *Id.* at 1304. "The reserve areas taken together (including late-successional reserves, congressionally reserved areas, administratively withdrawn areas, and riparian reserves) protect about eighty percent of the remaining [old growth] forest acres in the planning area from programmed timber harvest. Limited thinning and salvage operations are permitted in the Forest Service and BLM reserves." *Id.* at 1305.

<sup>419</sup> *Id.* at 1325.

<sup>420</sup> 43 U.S.C. § 1712(c)(3) (2000).

<sup>421</sup> *Id.* § 1702(a). BLM regulations provide that qualifying areas must meet two criteria: 1) the area must possess "a significant historic, cultural, or scenic value; a fish or wildlife resource or other natural system or process; or natural hazard," and 2) the value, resource, system, process or hazard in question "shall have substantial significance and values . . . and special worth, consequence, meaning, distinctiveness, or cause for concern." 43 C.F.R. § 1610.7-2 (2003).

<sup>422</sup> In *Seattle Audubon Society*, the court held that the Northwest Forest Plan's late Successional Reserves were not unlawfully withdrawn from the operation of public land laws in violation of FLPMA's withdrawal provisions (set out at 43 U.S.C. § 1714 (2000)), but were "merely an exercise of the Secretary's multiple-use planning responsibilities." 871 F. Supp. at 1314–15. With respect to the BLM lands covered by the Plan, the court cited FLPMA's provision for the designation and protection of ACECs as added support for the reserves. *Id.* (citing 43 U.S.C. § 1712(c) (2000)).

<sup>423</sup> BLM STATISTICS, *supra* note 400, at tbl. 5-15, available at [http://www.blm.gov/natacq/pls03/pls5-15\\_03.pdf](http://www.blm.gov/natacq/pls03/pls5-15_03.pdf). The largest amounts of land categorized as

has not been fully realized. The nonprofit group Forest Guardians undertook an extensive review of the status of ACECs in the southwest, and found that 16 percent of them have been developed for oil and gas production while 84 percent are leased for grazing, with little by way of environmental standards or mitigation requirements.<sup>424</sup> Twenty-one percent of the 1,275 stream-miles within those ACECs were in violation of federal water quality standards.<sup>425</sup> Forest Guardians also found that the most biologically rich areas were not represented in the system.<sup>426</sup> Perhaps most troubling was that BLM had provided only minimal guidelines for implementing conservation measures or monitoring resource values in its management plans for the majority of the ACECs in question.<sup>427</sup>

The less than stellar track record of ACECs stems in part from BLM's historically narrow view of its authority to designate and protect them under FLPMA.<sup>428</sup> FLPMA's directive to "give priority" to ACECs affords a great deal of discretion to the agency and is not nearly as concrete as its requirements to allow grazing and mining.<sup>429</sup> In contrast to wilderness, the public has yet to demand careful stewardship of ACECs, which are relatively obscure among federal land holdings.<sup>430</sup> Yet FLPMA by no means precludes expansive use of ACECs to achieve conservation purposes;<sup>431</sup> rather, it provides solid grounds for such a strategy by explicitly recognizing that the preservation of certain lands "in their natural condition" is consistent with MUSY principles.<sup>432</sup>

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ACECs are in Alaska, California, Nevada and Utah. *Id.*

<sup>424</sup> JON-PAUL OLIVA ET AL., FOREST GUARDIANS, THE BUREAU OF LAND MANAGEMENT'S CONSERVATION MANDATE: AREAS OF CRITICAL ENVIRONMENTAL CONCERN IN ARIZONA, UTAH, COLORADO, AND NEW MEXICO 2 (Mar. 2004), <http://www.fguardians.org/pdf/acec-report.pdf>.

<sup>425</sup> *Id.* at 3.

<sup>426</sup> *Id.* at 2. Only 11% of the total ACEC acreage in the Southwest contained 10 or more known occurrences of federally protected species. *Id.*

<sup>427</sup> See *id.* at 3 ("The directives that establish ACECs are often little more than a list of the resource values intended for protection and a short, often vague, description of land use restrictions to be put in place. Very few ACECs have site-specific management plans that are detailed enough to allow for land managers to implement needed conservation measures. Equally distressing is the lack of agency focus on monitoring the conditions within ACECs.").

<sup>428</sup> Robert B. Keiter, *Beyond the Boundary Line: Constructing a Law of Ecosystem Management*, 65 U. COLO. L. REV. 293, 312 n.106 (1994); FAITH T. CAMPBELL & JOHANNA H. WALD, NATURAL RESOURCES DEFENSE COUNCIL, AREAS OF CRITICAL ENVIRONMENTAL CONCERN: PROMISE VERSUS REALITY, at ii-iv (1989).

<sup>429</sup> Compare 43 U.S.C. § 1712(c)(3) (2000) (identifying ACECs as a priority among a list of items to consider in land use planning), with *id.* §§ 1751-1753 (providing detailed requirements for grazing leases and permits), and *id.* § 1732(b) (stating that, with certain caveats, nothing "shall in any way amend the Mining Law of 1872 or impair the rights of any locators or claims under that Act").

<sup>430</sup> See OLIVA ET AL., *supra* note 424, at 62 (discussing the vulnerability of two neighboring ACECs).

<sup>431</sup> See *Seattle Audubon Soc'y v. Lyons*, 871 F. Supp. 1291, 1315 (W.D. Wash. 1994) (rejecting the argument that large late successional reserves were precluded by the withdrawal provisions of FLPMA), *aff'd*, 80 F.3d 1401 (9th Cir. 1996).

<sup>432</sup> 43 U.S.C. § 1701(a)(8) (2000). FLPMA also recognizes that "some lands may be used for less than all of the resources." *Id.* § 1702(c).

As beneficial as they are, ACECs, Late Successional Reserves, and RNAs comprise only one piece of the administrative land management puzzle. A comprehensive preservation strategy for the federal public lands will require much more than individual or even regional planning efforts.

## *2. The Roadless Area Conservation Rule*

In the wake of the RARE wilderness studies and the spotted owl wars in the Pacific Northwest, the Clinton Administration attempted to attain closure on the most contentious issues related to Forest Service roadless areas through a sweeping rulemaking initiative during Clinton's second term in office. The effort began in 1998, when Forest Service Chief Mike Dombeck called for a temporary halt to road construction in inventoried roadless areas in the National Forest System.<sup>433</sup> Subsequently, an Interim Roads Rule suspended road construction for eighteen months,<sup>434</sup> and President Clinton directed the agency to develop regulations to provide long-term protection for roadless areas.<sup>435</sup> The Forest Service issued its proposed rule and draft EIS in May 2000, and a final EIS in November 2000.<sup>436</sup> The EIS's environmentally preferred alternative, covering all previously inventoried roadless areas, was ultimately selected in the final Roadless Rule in January 2001.<sup>437</sup> During the development of the Rule, over 600 public meetings were held and nearly two million comments were submitted, the vast majority of which supported roadless area protection.<sup>438</sup>

The Roadless Rule affects 58.5 million acres, which is 31 percent of all National Forest System land or approximately two percent of the entire land base of the continental United States.<sup>439</sup> According to a reviewing court, under the Rule, "this vast national forest acreage, for better or worse, was

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<sup>433</sup> USDA FOREST SERVICE, ROADLESS AREA CONSERVATION: QUICK ANSWERS, at <http://www.roadless.fs.fed.us/qanswers/qa2.shtml> (last visited Nov. 14, 2004).

<sup>434</sup> See Administration of the Forest Development Transportation System: Temporary Suspension of Road Construction and Reconstruction in Unroaded Areas, 64 Fed. Reg. 7290 (Feb. 12, 1999) (to be codified at 35 C.F.R. pt. 212).

<sup>435</sup> See Memorandum from President William J. Clinton to the Secretary of Agriculture (Oct. 13, 1999), <http://usgovinfo.about.com/newsissues/usgovinfo/blroadless.htm>.

<sup>436</sup> See National Forest System Roadless Areas: Notice of Intent to Prepare and Environmental Impact Statement, 64 Fed. Reg. 56,306 (Oct. 19, 1999); Special Areas; Roadless Area Conservation: Notice of Proposed Rulemaking, 65 Fed. Reg. 30,276 (May 10, 2000); Special Areas; Roadless Areas Conservation: Final Rule, 66 Fed. Reg. 3244, 3263-66 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294).

<sup>437</sup> 66 Fed. Reg. at 3263-66. Although the proposed rule covered certain "unroaded" areas and portions of "inventoried roadless areas," 65 Fed. Reg. at 30,276, the final rule covers only "inventoried roadless areas" identified in a set of inventoried roadless area maps, 66 Fed. Reg. at 3250-51, 3272. These areas were inventoried in RARE I, RARE II and subsequent forest plans as potential candidates for wilderness designation. *Id.*

<sup>438</sup> See USDA FOREST SERV., ROADLESS AREA CONSERVATION RULEMAKING FACTS, at [http://roadless.fs.fed.us/documents/rule/zRULE\\_Facts\\_1-5-01.htm](http://roadless.fs.fed.us/documents/rule/zRULE_Facts_1-5-01.htm) (last visited Nov. 14, 2004); H. Michael Anderson, *National Forest Roadless Rule Goes to Ninth Circuit*, 2001 CAL. ENVTL. L. REP. 169, 171 (describing public comments on the draft EIS as 95 % in favor of the Rule).

<sup>439</sup> 66 Fed. Reg. at 3244.

more committed to pristine wilderness, and less amenable to road development."<sup>440</sup>

The stated purpose of the Roadless Rule is to "protect the social and ecological values and characteristics of inventoried roadless areas from road construction and reconstruction and certain timber harvest activities."<sup>441</sup> Roadless area characteristics are described as high quality air, water, and soils, undisturbed habitat for resident and migratory species, scenic values, and exceptional opportunities for recreation.<sup>442</sup>

The Roadless Rule restricts road construction and timber harvest and provides special measures for the Tongass National Forest in Alaska.<sup>443</sup> New construction and reconstruction of roads in inventoried roadless areas are generally prohibited except when necessary to 1) limit the threat of a catastrophic event, 2) allow environmental cleanup, 3) allow the exercise of rights previously granted by statute or treaty, 4) realign an "essential" existing road, 5) rectify hazardous conditions, or 6) complete a Federal Aid Highway Project if no other prudent alternative exists.<sup>444</sup> These are relatively narrow exceptions. In particular, the exception for catastrophic events permits road construction to protect public health and safety only in cases of an imminent threat of flood, fire, or other catastrophic event that, without intervention, would result in loss of life or damage to property.<sup>445</sup> A broader exception is provided for construction in conjunction with continuation, extension or renewal of a mineral lease.<sup>446</sup>

The prohibition on timber harvest also includes exceptions. Removing small trees may be allowed to improve habitat for endangered species, to avoid forest disasters by maintaining ecosystem composition, and for certain other activities having minimal impact.<sup>447</sup> Harvesting is also allowed if an area's roadless characteristics have been compromised by road construction and subsequent timber harvest.<sup>448</sup> Further, to protect existing expectations, activities authorized or under agency review at the time the Roadless Rule was issued, including timber contracts, may go forward.<sup>449</sup>

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<sup>440</sup> See *Kootenai Tribe*, 313 F.3d 1094, 1106 (9th Cir. 2002) (summarizing the history of the Roadless Rule).

<sup>441</sup> 66 Fed. Reg. at 3245. The purposes and need for the project were detailed in the FEIS: "to prohibit[] activities that have the greatest likelihood of degrading desirable characteristics of inventoried roadless areas and [to] ensur[e] that ecological and social characteristics of inventoried roadless areas are identified and evaluated through local land management planning efforts." *Kootenai Tribe*, 313 F.3d at 1124-25.

<sup>442</sup> 66 Fed. Reg. at 3272.

<sup>443</sup> *Id.*

<sup>444</sup> *Id.* at 3255.

<sup>445</sup> *Id.*

<sup>446</sup> *Id.* at 3256. In addition, "road construction needed in conjunction with a new lease may be allowed . . . if the lease is issued immediately upon expiration of the existing lease." *Id.*

<sup>447</sup> *Id.* at 3257. See also USDA FOREST SERV., CHANGES FROM PROPOSED TO FINAL RULE, at [http://roadless.fs.fed.us/documents/rule/zRULE\\_Changes\\_from\\_prop\\_2\\_final\\_1\\_4\\_01.htm](http://roadless.fs.fed.us/documents/rule/zRULE_Changes_from_prop_2_final_1_4_01.htm) (last visited Oct. 22, 2004) (charting changes, alternatives, and characteristics of the final rule).

<sup>448</sup> 66 Fed. Reg. at 3257.

<sup>449</sup> *Id.* at 3259, 3273.

States, tribes, and trade associations challenged the Rule in nearly a dozen different venues, with mixed results.<sup>450</sup> In *Kootenai Tribe of Idaho v. Veneman (Kootenai Tribe)*<sup>451</sup> the Ninth Circuit upheld the Roadless Rule against a NEPA challenge and reversed a preliminary injunction issued by an Idaho district court.<sup>452</sup> The appeal was heard after the Clinton Administration left office, leaving environmental groups, as intervenors, to mount the sole defense of the Roadless Rule.<sup>453</sup> Their leading argument was that NEPA did not apply to the Rule at all.<sup>454</sup> The Ninth Circuit held that, although NEPA does apply to the Roadless Rule, which “alters the environmental status quo” by reducing the human intervention that had become “part of the fabric of our national forests,” the EIS was adequate.<sup>455</sup> The court concluded that the agency had provided extensive information on the Roadless Rule and allowed time for meaningful public comment,<sup>456</sup> and that the FEIS’s analysis of the Rule’s cumulative effects was sufficient.<sup>457</sup> Moreover, the consideration of three action alternatives, all of which would ban road construction within roadless areas, was appropriate, as NEPA does

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<sup>450</sup> See National Forest System Land and Resource Management Planning; Special Areas; Roadless Area Conservation, 66 Fed. Reg. 35,918, 35,919 (July 10, 2001) (noting eight lawsuits, involving seven states in four federal circuits); *Forest Service Revision of Road Rule Could Include Exemptions for Energy*, INSIDE ENERGY, Nov. 24, 2003, at 11 (noting that the Eighth Circuit is weighing the appeal of a challenge to the Rule in North Dakota).

<sup>451</sup> 313 F.3d 1094 (9th Cir. 2002).

<sup>452</sup> *Id.* at 1126. The district court had found a variety of NEPA deficiencies in opinions issued in two separate cases, including a failure to allow a meaningful opportunity to comment, due to too little time for comment and failure to properly identify the roadless areas at issue in an accessible and timely fashion. *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d 1231, 1247 (D. Idaho 2001); *Idaho ex rel. Kempthorne v. United States Forest Serv.*, 142 F. Supp. 2d at 1260–61. The court also found that the record indicated a lack of meaningful consultation with the Tribe. *Kootenai Tribe of Idaho v. Veneman*, 142 F. Supp. 2d at 1245 & n.23. In addition, according to the court, the EIS failed to consider an adequate range of alternatives, as all but the “no action” alternative included “a total prohibition” on road construction, and failed to identify measures that could minimize the negative impacts of alternatives studied. *Id.* at 1262–63. *Cf. id.* at 1247 (stating that the EIS’s assessment of cumulative effects was inadequate).

<sup>453</sup> Intervenors include Forest Service Employees for Environmental Ethics, Defenders of Wildlife, Natural Resources Defense Council, The Wilderness Society, Sierra Club, and a number of local groups. *Kootenai Tribe of Idaho*, 142 F. Supp. 2d at 1231; *Earthjustice Argues in Defense of Roadless Forests at Ninth Circuit Court of Appeals*, EARTHJUSTICE NEWSROOM, Oct. 15, 2001, at <http://www.earthjustice.org/news/display.html?ID=249> (visited Nov. 14, 2003). The Bush Administration did not defend the Roadless Rule in court. *Kootenai Tribe*, 313 F.3d at 1111.

<sup>454</sup> *Kootenai Tribe*, 313 F.3d at 1114. Under *Douglas County v. Babbitt*, 48 F.3d 1495 (9th Cir. 1995), actions that do not change existing environmental conditions or commit resources to affirmative human action affecting the environment do not require NEPA analysis. *Id.* at 1505.

<sup>455</sup> *Kootenai Tribe*, 313 F.3d at 1115.

<sup>456</sup> *Id.*, see also *id.* at 1119 (stating that the agency had provided adequate information and that the 69-day comment period allowed for meaningful public participation, and concluding that “NEPA requires that agencies give a hard look to environmental impact . . . but not necessarily an interminably long look”).

<sup>457</sup> *Id.* at 1120–21. The court stated that the “potential cumulative effects of the Roadless Rule are too speculative to be amenable to in-depth analysis in the EIS” and that the “discussion of mitigating measures, with an extensive discussion of forest health and fire ecology” was adequate. *Id.* at 1123.



not require the agency to consider alternatives inconsistent with its basic policy objectives to protect “compelling environmental, conservation and wilderness values.”<sup>458</sup>

The Ninth Circuit concluded,

[T]he conservation and preventative goals of the Forest Service in promulgating the Roadless Rule are entirely consistent with the policy objectives of NEPA, as well as with the Forest Service’s own mission. . . . NEPA may not be used to preclude lawful conservation measures by the Forest Service and to force federal agencies, in contravention of their own policy objectives, to develop and degrade scarce environmental resources. The Forest Service, as steward of our priceless national forests, is in the best position, after hearing from the public, to assess whether current roads adequately aid forest management practices and whether a general ban on new roads in roadless areas of national forest serves appropriate conservation and budgetary interests.<sup>459</sup>

Accordingly, an injunction was not warranted, and in fact flew in the face of the strong public interest “in preserving precious, unreplaceable resources . . . and in preserving our national forests in their natural state.”<sup>460</sup>

A district court in Wyoming viewed the Roadless Rule in a completely different light. In *Wyoming v. United States Department of Agriculture*,<sup>461</sup> the court concluded that the Rule violates both NEPA and the Wilderness Act. According to the Wyoming court, NEPA deficiencies included a failure to provide a meaningful opportunity to comment and a failure to consider a broader range of alternatives to the Rule.<sup>462</sup> The court also concluded that there is no significant difference between roadless areas and wilderness areas, thus the Roadless Rule violates Section 1131 of the Wilderness Act, which reserves the power to designate wilderness areas to Congress.<sup>463</sup> Finally, although no constitutional claim was at issue, the decision characterized the Rule as an unconstitutional infringement on congressional prerogatives to manage the public lands.<sup>464</sup> The court disparaged the Rule as a mere political ploy to advance President Clinton’s “conservation legacy.”<sup>465</sup> The environmental groups’ appeal is pending before the Tenth Circuit.<sup>466</sup>

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<sup>458</sup> *Id.* at 1121 (emphasis added). The court explained that NEPA’s “alternatives requirements must be interpreted less stringently when the proposed agency action has a primary . . . purpose to conserve and protect the natural environment.” *Id.* at 1120.

<sup>459</sup> *Id.* at 1122.

<sup>460</sup> *See id.* 1125 (“Although plaintiffs urge that ills [such as fires and infestation] will ensue from the Roadless Rule, the situation is not black and white, and the balancing of all competing considerations is within the precise sphere of the Forest Service’s expertise and mission.”).

<sup>461</sup> 277 F. Supp. 2d 1197 (D. Wyo. 2003).

<sup>462</sup> *Id.* at 1220–25.

<sup>463</sup> *Id.* at 1233–37 (citing 16 U.S.C. § 1131(a) (2000)).

<sup>464</sup> *Id.* at 1238–39.

<sup>465</sup> *See id.* at 1203 (“Today, the Court considers the legality of 58.5 million acres of roadless area that the United States Forest Service drove through the administrative process in a vehicle smelling of political prestidigitation.”).

<sup>466</sup> *See* Jim Hughes, *Justice Department Backs Ruling against Roadless Initiative*, DENVER POST, Nov. 14, 2003, 2003 WL 5525471 (noting that the government has moved to dismiss the appeal). Shortly after the appeal was filed, another district court within the Tenth Circuit

Although the Ninth Circuit did not have occasion to consider a Wilderness Act claim in *Kootenai Tribe*, it ultimately concluded “[t]here can be no serious argument that restrictions on human intervention in these *wilderness* areas will not result in immeasurable benefits from a conservationist standpoint.”<sup>467</sup> Contrary to the Wyoming court’s opinion, the Wilderness Act does not prohibit administrative preserves. Section 1131(a) of the Wilderness Act states that “no Federal lands shall be designated as ‘wilderness areas’ except as provided for in this Act or by a subsequent Act,” thereby reserving the power to designate areas for inclusion in the National Wilderness Preservation System to Congress.<sup>468</sup> By speaking only to the power to *designate*, rather than the power to recognize, manage, or preserve, this provision merely denies other entities, including the executive branch, authority to bestow a particular area with the official “wilderness” label. The statute’s use of quotation marks to set apart the phrase “wilderness areas” also appears to create a legislative term of art—a special label—leaving the executive branch free to adopt other preservation-oriented management measures, such as the Roadless Rule, RNAs, ACECs, and national landscape monuments.<sup>469</sup>

Other statutory provisions are consistent with this interpretation. Section 1133(a) of the Wilderness Act indicates that the Forest Service’s power to conserve certain undeveloped areas is undiminished: “The purposes of this chapter are hereby declared to be within and supplemental to the purposes for which national forests . . . are established and administered.”<sup>470</sup> National Forests are established to protect forests and watersheds, and the agency has long utilized RNAs and primitive area designations to accomplish these objectives.<sup>471</sup> The Wilderness Act further provides that “[n]othing in this chapter shall be deemed to be in interference with the purposes for which national forests are established as set forth in [the Forest Service Organic Act and MUSYA].”<sup>472</sup> MUSYA, passed while early versions of the Wilderness Act were pending, declares that “the establishment and maintenance of areas of wilderness are consistent” with its purposes and provisions,<sup>473</sup> and NFMA explicitly lists wilderness as one of the uses for which forests must be managed.<sup>474</sup>

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concluded that the Wilderness Act does not preclude national landscape monuments. See *Utah Ass’n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1192–93 (D. Utah 2004).

<sup>467</sup> *Kootenai Tribe*, 313 F.3d 1094, 1124–25 (9th Cir. 2002) (emphasis added).

<sup>468</sup> 16 U.S.C. § 1131(a) (2000).

<sup>469</sup> *Id.*; see McCloskey, *supra* note 101, at 306 (noting that the executive branch may reserve areas for wilderness purposes); *Mountain States Legal Found.*, 306 F.3d 1132, 1138 (D.C. Cir. 2002) (describing statutory authority for land withdrawals and reservations); *Utah Ass’n of Counties*, 316 F. Supp. 2d at 1193 (concluding that the President’s protection of 1.7 million acres of federal land by designating the Grand Staircase–Escalante National Monument under the Antiquities Act did not violate the Wilderness Act).

<sup>470</sup> 16 U.S.C. § 1133(a) (2000).

<sup>471</sup> See *United States v. New Mexico*, 438 U.S. 696, 708–09 (1978) (describing dual purposes of forest reservations). See *supra* Part V.B.1 for a discussion of RNAs and primitive areas.

<sup>472</sup> 16 U.S.C. § 1133(a) (2000).

<sup>473</sup> *Id.* § 529.

<sup>474</sup> *Id.* § 1604(e)(1).

Section 1132 of the Wilderness Act muddies the waters somewhat. This section, which delineates the executive branch's role in the creation of wilderness areas, provides that "[n]othing contained herein shall, by implication or otherwise, be construed to lessen the present statutory authority of the Secretary of the *Interior* with respect to the maintenance of roadless areas within units of the national park system."<sup>475</sup> Arguably, this provision cuts against lodging a general preservation authority in the Forest Service, as it contains no similar savings clause for the Secretary of Agriculture.<sup>476</sup>

Areas covered by the Roadless Rule, however, are not the same as wilderness areas. They were included within the Roadless Rule's scope solely on the basis of their roadlessness, and while roadlessness is a key attribute of wilderness, wilderness areas are designated based on the four factors listed in Section 1131 of the Act.<sup>477</sup> Moreover, roadless areas can be modified or removed from roadless status by rulemaking or other executive action, while wilderness designations can only be modified by Congress.

There are also critical distinctions between the Roadless Rule's management measures and the Wilderness Act's requirements. The Wilderness Act is far more restrictive with respect to most activities. Snowmobiles, motorcycles, mountain bikes, and other means of mechanized transport are prohibited in wilderness areas, but not in roadless areas.<sup>478</sup> Commercial activities, such as timber harvest and most mining activities, are prohibited in wilderness areas but not in roadless areas.<sup>479</sup> Further, the Wilderness Act authorizes the purchase of private lands to eliminate or minimize inholdings and protect wilderness characteristics, while the Roadless Rule simply provides access to inholders.<sup>480</sup> On the other hand, certain discretionary "measures," possibly including road building, may occur in wilderness to control fire, disease or infestation, but road construction may occur in roadless areas only to protect public health and safety in the face of *imminent* threat of flooding, fires or other catastrophic events.<sup>481</sup>

When President Bush took office in 2001, his administration delayed the effective date of the Roadless Rule "to give Department officials the opportunity for further review and consideration."<sup>482</sup> It then sought

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<sup>475</sup> *Id.* § 1132(c) (emphasis added).

<sup>476</sup> Compare *id.* with *id.* § 1132(b) (delineating the review process to be conducted by the Secretary of Agriculture, without providing a similar savings clause). The House Report evidences a clear congressional desire to curtail, in particular, Forest Service discretion. See McCloskey, *supra* note 101, at 306 (reviewing the House Report, but noting strong arguments for an interpretation that maintains administrative preservation authority based on the plain language of the Wilderness Act).

<sup>477</sup> Compare Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3245 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294), with 16 U.S.C. § 1131(c) (2000).

<sup>478</sup> Compare 66 Fed. Reg. at 3249–50, with 16 U.S.C. § 1133(c) (2000).

<sup>479</sup> Compare 66 Fed. Reg. at 3256, with 16 U.S.C. § 1133(c)–(d) (2000). The Roadless Rule's prohibition on road construction would, however, inhibit mining and logging.

<sup>480</sup> Compare 66 Fed. Reg. at 3255–56, with 16 U.S.C. § 1134(c) (2000).

<sup>481</sup> Compare 66 Fed. Reg. at 3255–56, with 16 U.S.C. § 1133(d)(1) (2000).

<sup>482</sup> Special Areas; Roadless Area Conservation: Delay of Effective Date, 66 Fed. Reg. 8899,

additional public comment on the management of roadless areas, stating that “continuing controversy over the rule” and “legal uncertainties” made offering a revised rule “impractical . . . at this time.”<sup>483</sup> Although a revised final rule has not yet issued, the Department of Agriculture has removed the Tongass National Forest from the Roadless Rule’s purview,<sup>484</sup> and has proposed a rule that would replace the Roadless Rule with a provision that allows governors to propose recognition of roadless areas on a state-by-state basis, subject to approval by the Secretary.<sup>485</sup> The Department has also extended the compliance deadline for implementing the revised planning rules.<sup>486</sup>

The Clinton Roadless Rule fills in an essential piece of the preservation puzzle by providing a comprehensive, nationwide strategy for Forest Service wild lands. Administratively created ecosystem-scale wild land preserves have been authorized in numerous other contexts, and could be compelled where necessary to satisfy NFMA’s diversity requirement. The Northwest Forest Plan is the best known and most widely tested example.<sup>487</sup> Although that Plan was accomplished through simultaneous land and resource management plan amendments for the units at issue rather than nationwide rulemaking, the Roadless Rule is consistent with its pathbreaking approach to sustainable public lands management. The Rule also complements the RNA network by providing an integrated, comprehensive management strategy for all inventoried roadless areas, including small, isolated RNAs. If some roadless areas ought not to be included because they lack desirable ecological values due to degradation or for other reasons, they can be excluded from the Roadless Rule’s purview by subsequent planning efforts.<sup>488</sup>

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8899 (Feb. 5, 2001).

<sup>483</sup> Unified Agenda and Advanced Notice of Proposed Rule, 66 Fed. Reg. 61,396, 61,400 (Dec. 3, 2001).

<sup>484</sup> See Special Areas; Roadless Area Conservation; Applicability to the Tongass National Forest, Alaska, 68 Fed. Reg. 75,136, 75,136 (Dec. 30, 2003) (to be codified at 36 C.F.R. pt. 294) (temporarily exempting the Tongass National Forest from prohibitions against timber harvest and road construction in roadless areas until the Department promulgates a subsequent rule concerning the application of the Roadless Rule within Alaska).

<sup>485</sup> Special Areas; State Petitions for Inventoried Roadless Management, 69 Fed. Reg. 42,636 (proposed July 16, 2004) (to be codified at 36 C.F.R. pt. 294).

<sup>486</sup> See National Forest System Land and Resource Management and Planning; Extension of Compliance Deadline, 67 Fed. Reg. 35,431 (May 20, 2002) (to be codified at 36 C.F.R. pt. 219) (extending deadline until new final plan for implementation adopted); National Forest System Land and Resource Management Planning; Extension of Compliance Deadline, 66 Fed. Reg. 27,552 (May 17, 2001) (to be codified at 36 C.F.R. pt. 219) (delaying implementation by one year). As of this writing, a final revised planning rule has yet to be issued.

<sup>487</sup> See notes 416–19, *supra* (describing the Northwest Forest Plan).

<sup>488</sup> See 66 Fed. Reg. 3244, 3257 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294) (allowing timber harvest in areas “substantially altered” by logging); *id.* at 3255–56 (allowing construction to realign essential roads); Roadless Area Protection; Interim Direction, 66 Fed. Reg. 44,111, 44,112–13 (Aug. 22, 2001) (providing interim directives that reserve the Chief’s authority to approve timber harvest and road building in roadless areas on a case by case basis).

## VI. PROCEDURAL ASPECTS OF LEGISLATIVE AND EXECUTIVE PROCESSES

*"[W]e live in an era where conservation and democracy are inextricably linked."*<sup>489</sup>

The Roadless Rule and other wild land preservation initiatives, be they legislative, presidential, or administrative, raise crucial procedural issues. Critics of presidential and administrative preservation decisions claim that bedrock principles of democracy are at stake, but in truth, similar process-oriented concerns are implicated by nearly all governmental decision making: predictability; visibility; evenhandedness; political and judicial accountability; fostering public buy-in on local, regional, and national levels; ensuring accuracy and the utilization of unbiased sources of expertise; and timeliness.<sup>490</sup> Conventional wisdom gives administrative rulemaking the highest marks with respect to expertise and accuracy, and the availability of judicial review fosters accountability. Legislation scores well in terms of visibility, accountability, and public acceptance. Presidential declarations arguably fare the worst on all counts except for one extremely important aspect of the preservation agenda: timeliness.

All of these concerns go toward the "ultimate touchstone of legitimacy," as described by Professor Chayes in his seminal article on public law: sustainability and public assent over the long haul.<sup>491</sup> When viewed through this wide-angle lens, it becomes apparent that the strengths and weaknesses of the three decision makers are, by and large, complementary in terms of preserving the public lands in a manner that satisfies procedural objectives.

*A. Does Legislated Wilderness Reflect "Democracy at Work"?<sup>492</sup>*

The designation process established by the Wilderness Act employs the executive branch in recommending appropriate areas, but leaves the actual designation to Congress. Once qualifying places have been identified and recommended by the agencies and the President, congressional representatives and their constituents may investigate, deliberate, and forge

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<sup>489</sup> Keiter, *supra* note 143, at 533.

<sup>490</sup> For resources discussing the function and objectives of regulatory action, see generally Richard E. Levy & Sidney A. Shapiro, *Administrative Procedure and the Decline of the Trial*, 51 U. KAN. L. REV. 473 (2003) (discussing objectives and advantages of administrative processes as compared to adjudication by judicial trials); Richard L. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 GEO. L.J. 2225 (1997) (discussing goals of judicial review of agency action); Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451 (1997) (analyzing whether requiring federal advisory committees advances good-government goals such as openness and efficiency); Richard H. Pildes & Cass R. Sunstein, *Reinventing the Regulatory State*, 62 U. CHI. L. REV. 1 (1995) (assessing the role of regulatory impact analysis in effectuating efficiency, accuracy and overall effectiveness of decisionmaking).

<sup>491</sup> Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1316 (1976) (describing the advantages of judicial, rather than legislative or bureaucratic, resolution of public policy conflicts).

<sup>492</sup> See Jenkins, *supra* note 185, at 8.

compromises with regard to wilderness designation, boundaries, and management measures.<sup>493</sup>

Congressional designation of official wilderness areas is a cumbersome process, however, and in recent years designations of new wilderness areas have been slow to nonexistent.<sup>494</sup> Other than the 3.5 million acres protected in the California Desert Protection Act of 1994,<sup>495</sup> few significant designations have occurred since 1984.<sup>496</sup> This is in part due to general legislative inertia—Congress is simply not structured in a way that lends itself to expeditious resolution of policy choices. Congressional processes are largely static and inelastic.<sup>497</sup> Dispersed authority and regional and party alliances impede cooperative efforts and strategic leadership, particularly when it comes to environmental issues.<sup>498</sup> This phenomenon is prevalent in the legislated wilderness context, where the congressional process facilitates not only inertia but also the elevation of local over national interests. Individual members from affected districts are held accountable to the short-term interests of local commodity users, and those members hold a “near-veto power” over designation of properties in their districts.<sup>499</sup> A handful of vocal dissidents from the local district can and often do obstruct designation, even though the general public favors wilderness protection.<sup>500</sup>

Semantics count as well. The term “wilderness” has become a politically charged topic, drawing virtually impregnable battle lines between developers and preservationists, and local and national interest groups. Once the term is introduced to the congressional debate surrounding the disposition of a particular area, vituperative rhetoric and controversy are sure to follow, obfuscating rational discussion and deliberation.

Although Congress is often viewed as the most democratic of the policy-making branches, in fact it is virtually unfettered by procedural safeguards; each house is free to adopt procedural rules and to enforce them (or not).<sup>501</sup> Legislation may be more visible and predictable than decision

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<sup>493</sup> See 16 U.S.C. §§ 1131–1132 (2000). FLPMA provides for similar processes with regard to recommendations and designation of BLM lands. See 43 U.S.C. § 1714 (2000) (delineating process for withdrawing BLM lands).

<sup>494</sup> See Jenkins, *supra* note 185, at 1 (describing the movement to designate new wilderness as nearly “stalled out”); *id.* at 10 (depicting diminishing acres of new wilderness designations since 1994).

<sup>495</sup> 16 U.S.C. §§ 410aaa–410aaa-83 (2000).

<sup>496</sup> See Jenkins, *supra* note 185, at 8.

<sup>497</sup> Thomas L. Adams, Jr. & M. Elizabeth Cox, *The Environmental Shell Game and the Need for Codification*, 20 Env'tl. L. Rep. (Env'tl. L. Inst.) 10,367 (1990); see Chayes, *supra* note 491, at 1308–09 (describing the advantages of judicial over legislative resolution of public policy conflicts).

<sup>498</sup> Edmund S. Muskie, *Environmental Jurisdiction in the Congress and the Executive*, 22 ME. L. REV. 171, 171–76 (1970); see Zellmer, *supra* note 80, at 994–95 (noting that officials seeking reelection find it difficult to prioritize long-term environmental needs over more immediate economic concerns).

<sup>499</sup> Leshy, *supra* note 268, at 301.

<sup>500</sup> Jenkins, *supra* note 185, at 9.

<sup>501</sup> See U.S. CONST. art. I, § 5, cl. 2 (“Each House may determine the rules of its proceedings”); Sandra B. Zellmer, *Sacrificing Legislative Integrity at the Altar of Appropriations Riders: A Constitutional Crisis*, 21 HARV. ENVTL. L. REV. 457, 504 (1997) (describing vagaries of

making by executive order, but it is far less so than agency rulemaking. In theory, anyone can persuade an agency to recommend an area, or they may convince their representative to sponsor a wilderness bill, then watch it wind its way through committee and floor debate.<sup>502</sup> Public choice principles, however, demonstrate that local, specialized interests wield considerable power to block or water down preservation-oriented legislative proposals, displacing the more diffuse interests of disorganized, distant members of the public.<sup>503</sup> Controversial measures that elevate local concerns over the national interest can be easily tucked into hundred-page appropriation packages and effectively insulated from the give and play of public debate.<sup>504</sup> These problems are exacerbated by the fact that Congress is not required to support its choices by publicly expressed, reasoned elaboration.<sup>505</sup>

Designations resulting from processes established by the Wilderness Act are wildly popular with the public and have proven to be durable over the long run, but the Wilderness Act's provisions have not led to a sustainable preservation strategy, as too few wilderness areas have been included. Further, the results of this highly politicized process are too haphazard to ensure that areas included in the wilderness system satisfy biodiversity objectives while addressing sustainable development needs.

*B. Are Executively Decreed Preserves "Undemocratic"?<sup>506</sup>*

Nowhere is the executive power to preserve wild lands and natural communities so promising than with regard to the management of the federal public lands.<sup>507</sup> Unlike Congress and executive agencies, the President is able to act quickly to prevent irreversible harm when resources face development pressure. Although the streamlined process of issuing an executive order diminishes visibility and predictability, the President is in a unique position to address national biodiversity needs and other conservation objectives without being obstructed by undue influence from

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the congressional process).

<sup>502</sup> See Jenkins, *supra* note 185, at 8 ("The Wilderness Act is a real example of democracy at work. It is a citizens' law.") (quoting Bart Koehler, The Wilderness Society).

<sup>503</sup> See Blumm, *supra* note 98, at 407, 429 (explaining how small, well organized special interest groups exert disproportionate influence on decision making and thereby skew public lands management toward commodity use); *id.* at 416 (stating that legislatures can be described as "self-serving individuals whose chief interest is not the fostering of the public's interests, but rather of their own reelection" or as "either a playground of special interests or a passive mirror of self-interested constituents").

<sup>504</sup> See Zellmer, *supra* note 501, at 504–05 (explaining how public involvement and reasoned decision making are inhibited by existing legislative processes).

<sup>505</sup> See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15–16 (1959) (declaring that "no legislative or executive is obligated. . . to support its choice of values by the type of reasoned explanation that I have suggested is intrinsic to judicial action").

<sup>506</sup> Lin, *supra* note 236, at 707.

<sup>507</sup> See *United States v. Midwest Oil*, 236 U.S. 459, 471 (1915) (characterizing the President's power to withdraw and preserve public lands and resources from development as extensive as "the exigencies of the public service requires").

purely localized concerns. One of the more promising uses of the Antiquities Act power has been to break the impasse that develops during the legislative process when special interest groups obstruct national objectives for wild land preservation.<sup>508</sup>

Presidential declarations can include finely tailored yet flexible provisions best suited to the needs of the particular area. President Clinton's landscape conservation system of BLM "working monuments" provides new options for both biodiversity preservation and active management. Many of his executive orders contemplate continued grazing and even timber harvest, to the extent that such activities are consistent with the physical characteristics and integrity of the ecosystems at issue.<sup>509</sup>

But with extensive power comes the potential for abuse of power. President Clinton, and many presidents before him, unilaterally declared landscape-scale national monuments with no regular public process.<sup>510</sup> Unlike other public lands management and environmental statutes, which typically provide extensive prescriptions for administrative processes and appeals,<sup>511</sup> Antiquities Act withdrawals lack procedural safeguards. The Antiquities Act provides no means for members of the interested public to receive notice of the decision-making process or to make their views known through public hearings or the submission of comments.<sup>512</sup> In addition, unlike agency action (including wilderness recommendations), the President is not subject to NEPA, so environmental effects need not be assessed nor alternatives considered when a new national monument is declared.<sup>513</sup> Viable alternatives regarding the geographic scope of the withdrawal or

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<sup>508</sup> See *supra* note 268 (citing examples).

<sup>509</sup> See Keiter, *supra* note 143, at 530–33 (concluding that management provisions for the Grand Staircase–Escalante National Monument reflect both conservation and democratic principles, and expressing hope for the Monument and the people who care about it for "generations to come").

<sup>510</sup> See Zellmer, *supra* note 80, at 1044 (describing the Clinton Administration's establishment of various national monuments).

<sup>511</sup> See National Forest Management Act of 1976, 16 U.S.C. §§ 1600–1687 (2000); Federal Land Policy and Management Act of 1976, 43 U.S.C. §§ 1701–1785 (2000). As a result of NEPA, NFMA, and FLPMA, "[r]ulemaking is required, records are open, decision-making is shared, and the courts are available because public lands business is public business." Charles F. Wilkinson, *The Public Trust Doctrine in Public Land Law*, 14 U.C. DAVIS L. REV. 269, 304 (1980).

<sup>512</sup> See Rasband, *supra* note 272, at 560–61 (concluding that the Antiquities Act should be amended to include procedural safeguards because "[a]chieving preservation should not come at the expense of a fair process"). I once expressed a belief that regulatory requirements for public notice and NEPA-like analyses might benefit the monument designation process, see Zellmer, *supra* note 80, at 1046–47, but in view of the full range of preservation options assessed here, process-oriented regulations would more likely inhibit presidential action to the detriment of an integrated preservation strategy.

<sup>513</sup> See 42 U.S.C. § 4332(C) (2000) (requiring agencies to prepare environmental analyses); see also *Alaska v. Carter*, 462 F. Supp. 1155 (D. Alaska 1978) (holding that NEPA does not apply to monument declarations because the President is not a federal agency); *Utah Ass'n of Counties v. Bush*, 316 F. Supp. 2d 1172, 1183–84 (D. Utah 2004) (concluding that NEPA does not apply to a presidential declaration under the Antiquities Act, even if the initial monument idea originated with an agency). In contrast, secretarial withdrawal decisions require notice and an opportunity for public hearing, along with NEPA analysis. 43 U.S.C. § 1714 (2000).



allowable activities within monument boundaries may be overlooked, raising the potential for inaccuracy.

Absent regular predesignation processes, opposing viewpoints are less likely to be publicly aired and fully considered, and affected parties may be surprised. As a result, Antiquities Act withdrawals create at least the appearance of arbitrary decision making, bias against western interests, and abuse of power. To mollify local opposition and address criticisms about heavy-handed, unilateral decision making, the Clinton Administration engaged in outreach efforts and afforded some opportunity for public input with regard to its more recent designations.<sup>514</sup> Other administrations, however, may not be as amenable to public processes.

The concerns raised by a lack of public process are exacerbated by the lack of opportunity for probing judicial review. The Administrative Procedure Act (APA)<sup>515</sup> provides for review of "final agency action," but the President is not an agency within the purview of the APA.<sup>516</sup> Even so, limited judicial review of presidential decision making does occur and provides a "check" on decisions that fail to comport with the Antiquities Act's requirements, albeit a fairly light one.<sup>517</sup>

These disadvantages are outweighed by the procedural and substantive advantages of presidential action. As detailed earlier in this article, the broad array of substantive advantages is compelling.<sup>518</sup> Procedurally, the President is acutely politically accountable to the voters and his party, even as a lame duck, and is less amenable to "capture" by narrow special interest groups than congressional representatives or administrative agencies.<sup>519</sup> Further, no individual can claim unfair surprise or curtailment of reasonable expectations due to monument declarations. Declarations either protect

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<sup>514</sup> See Leshy, *supra* note 131, at 217–18 (describing the public process leading to monument designation employed during Babbitt's tenure at the Department of the Interior).

<sup>515</sup> 5 U.S.C. §§ 551–559, 701–706, 1305, 3105, 3344, 4301, 5335, 5372, 7521 (2000).

<sup>516</sup> *Id.* § 704; see *Dalton v. Specter*, 511 U.S. 462, 468–70 (1994) (holding the actions of the President not to be reviewable under the APA because the President is not an "agency" under the Act); *Franklin v. Massachusetts*, 505 U.S. 788, 796, 800–01 (1992) (holding that, since APA does not expressly allow review of Presidential actions, they are not reviewable for abuse of discretion, only for constitutionality).

<sup>517</sup> See *Tulare County v. Bush*, 306 F.3d 1138, 1141 (D.C. Cir. 2002) (discussing the need for review to determine whether sufficient factual basis for designation was provided in accord with statute), *rehearing en banc denied* (2003), *cert. denied*, 124 S. Ct. 63 (2003); *Mountain States Legal Found. v. Bush*, 306 F.3d 1132 (D.C. Cir. 2002) (discussing Supreme Court directive to review Presidential proclamations for consistency with constitutional principles and separation of powers), *rehearing en banc denied* (2003), *cert. denied*, 124 S. Ct. 61 (2003); *Wyoming v. Franke*, 48 F. Supp. 890, 896 (D. Wyo. 1945) (reviewing facts supporting President's designation of national monument). Because the APA does not apply, Monument proclamations are not accompanied by administrative records. Although many of the Clinton proclamations provide detailed findings, not all do, and courts may be left with post hoc rationalizations prepared solely for litigation purposes. See *id.* at 896 (admitting extra-record evidence of historic and scientific objects, in view of cursory statements contained in the presidential proclamation).

<sup>518</sup> See *supra* Part V.A for a discussion of the effectiveness of presidential proclamations.

<sup>519</sup> See Lin, *supra* note 236, at 740 (discussing the minimal risk of agency capture under the Antiquities Act).

valid existing rights or direct that they be bought out.<sup>520</sup> Moreover, nothing is surprising about presidential preservation initiatives, which take place against a backdrop of over a century of practice in designating federal land preserves.<sup>521</sup>

Finally, and perhaps most importantly, preservation-oriented action simply maintains the status quo. Congress can always step in and change course if it likes. Demonstrating both long-term sustainability and public acceptance, Congress has only abrogated a handful of national monuments since 1906 but it has expanded their boundaries or provided additional recognition for various national monuments by converting them to National Parks on numerous occasions.<sup>522</sup> Meanwhile, affected interests can shape management policies governing on-the-ground uses during the public process that occurs for each monument's general management plan.<sup>523</sup> Post-declaration land management plans provide extensive opportunities for public involvement and the adoption of adaptive management measures best suited for the area and the resources in question. In sum, both preservation goals and democratic values are well served through monument declarations.

### *C. Do Agency Preservation Initiatives Upset the Balance?*

The administrative process—rulemaking and planning—is relatively well suited to satisfying procedural concerns regarding the preservation of wild lands. Executive agencies have effectively placed millions of acres of wild lands off limits to roads, mineral development, and logging through public planning processes and rulemaking. The Roadless Rule provides an excellent example, where opportunities for public input were provided and environmental analyses and alternatives were vetted through the NEPA and NFMA processes.<sup>524</sup> The Forest Service chose rulemaking as the appropriate decision-making path for roadless conservation because “[a]t the national level, Forest Service officials have the responsibility to consider the ‘whole picture’ regarding the management of the National Forest System, including inventoried roadless areas.”<sup>525</sup> The agency also cited the extreme controversy over management of roadless areas as justification for nationwide rulemaking, noting in particular the “extensive amount of

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<sup>520</sup> See Squillace, *supra* note 237, at 574 (“Existing resource users within monument boundaries generally hold valid existing rights, which allow them to maintain these uses.”).

<sup>521</sup> See *United States v. Midwest Oil*, 236 U.S. 459, 469–71 (1915) (noting that presidential orders withdrawing lands from acquisition by private parties have been made continually since inception of the U.S.).

<sup>522</sup> Keiter, *supra* note 143, at 531–32; Squillace, *supra* note 237, at 550. Grand Canyon, Bryce Canyon, Grand Teton, Arches, Capital Reef and Zion National Parks are just a few of the monuments that were later converted into congressional preserves. Keiter, *supra* note 143, at 531.

<sup>523</sup> See Lin, *supra* note 236, at 228–29 (describing congressional modifications of monument designations).

<sup>524</sup> See *supra* Section V.B.2 for a discussion of public input on the Roadless Rule.

<sup>525</sup> Special Areas; Roadless Area Conservation, 66 Fed. Reg. 3244, 3246 (Jan. 12, 2001) (to be codified at 36 C.F.R. pt. 294)

congressional debate" and the need to act in a timely fashion to conserve roadless area values.<sup>526</sup>

The administrative process is by no means perfect. Like legislation, it suffers from special interest group capture.<sup>527</sup> Moreover, agencies and constituents feel hamstrung by "analysis paralysis," a phenomenon arising from the very procedural requirements that serve as the administrative process's strength.<sup>528</sup>

These deficits are problematic, to be sure, but they are largely offset by the procedural advantages of administrative processes dictated by the APA, particularly public involvement and judicial review.<sup>529</sup> The rulemaking process can facilitate access to the decision maker and provide meaningful opportunities for public participation by all concerned parties. Rulemaking is more visible and responsive to public concerns and therefore more likely to result in public assent or "buy-in" than executive orders and, in many ways, even legislation. The availability of judicial review fosters agency accountability by providing an important check on arbitrary action.

Both nationwide rulemaking for roadless area conservation and individual or regional planning efforts are crucial elements of an executive preservation strategy. Rulemaking provides a comprehensive and uniform approach, while planning processes are especially well suited to consider and reflect the unique features of individual areas to implement adaptive management measures necessary to protect those features. Regulatory ossification or inertia is not at all uncommon, but administrative processes provide opportunities for rules and planning instruments to be revised or amended through the same procedures by which they were adopted. In spite of the potential for revision, preservation through administrative processes has tended to be sustainable over time, as evidenced by the long-standing system of research preserves (RNAs).

Although each decision-making process—congressional, presidential, and administrative—has procedural weaknesses or disadvantages, they have effectuated a relatively extensive preservation network without sacrificing fundamental procedural safeguards. There has been no cohesive or integrated federal strategy for the identification, designation and protection of wild preserves, but the result is still laudable from both process-oriented and substantive standpoints: a sustainable preservation network that has justifiably fostered strong public assent over the course of the past century.

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<sup>526</sup> *Id.*

<sup>527</sup> See Blumm, *supra* note 98, at 407 (describing public choice theory and pressures of special interest groups on agencies); Lazarus, *supra* note 67, at 1106–09 (describing agency "capture" phenomenon).

<sup>528</sup> See STATEMENT BEFORE THE HOUSE SUBCOMM. ON FORESTS AND FOREST HEALTH (June 12, 2002) (statement of Dale Bosworth, Chief, U.S. Forest Serv.), available at <http://www.usda.gov/agency/ocr/download/FS-Bosworth-6.12.02.pdf> (describing "analysis paralysis" phenomenon in forest planning).

<sup>529</sup> 5 U.S.C. §§ 553, 706 (2000). Although the APA explicitly exempts decisions concerning public property, including federal public lands, from rulemaking procedures, see *id.* § 553(a)(2), in practice and in their own regulations management agencies do in fact provide for notice and comment rulemaking, see Anderson & Moncrief, *supra* note 136, at 438 n.175 (noting that land management agencies do not usually take advantage of the exemption).

## VII. CONCLUSION

The preservation of wilderness and other wild, unroaded lands remains a viable and imperative component of public lands management. Wild lands provide invaluable human benefits, such as quiet, aesthetic pleasure, and high quality recreational opportunities. They also form the biodiversity core necessary for attaining the broader objective: a sustainable federal preservation strategy.

As yet, there is no comprehensive preservation strategy. The National Wilderness System, national landscape monuments, and roadless area conservation through the Roadless Rule together serve as a crucial place-marker that will enable us, as a Nation, to visualize and to eventually adopt such a strategy.

Congress, acting alone, cannot satisfy ecological and anthropocentric needs for wild land preservation. The Wilderness Act, which protects untrammeled areas rich in aesthetic beauty or remote enough to avoid conflicts with development interests (or both), does not fully reflect biodiversity needs. The existing wilderness system, however, does serve biodiversity ends, albeit in a rather haphazard way, by virtue of its roadlessness. But Congress has been unable to enact significant wilderness legislation in the past decade, and those wilderness areas that have been designated in recent years are generally smaller than earlier designations and are riddled with compromise provisions allowing jet boats, overflights, and other mechanized intrusions.

Both presidential action and agency rulemaking are necessary complements to the congressional process. The Roadless Rule, in particular, serves a crucial function in tying together wilderness areas and smaller, otherwise isolated administrative wild lands. Together, the three approaches for wild lands preservation—congressional, presidential, and administrative—provide a solid basis for fulfilling the nation's long-term needs for both biodiversity and sustainable land and resource management. The resulting network of interrelated wild land preserves forms a whole much greater than the sum of its parts. By the same token, the obstruction of any one of these approaches, or the eradication or destruction of the preserves created by them, would deal a crippling blow to the nation's prospects for a comprehensive preservation strategy.